

BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2017-305-E

IN RE:	)	BRIEF OF ATTORNEY GENERAL
Request of the South Carolina Office of	)	IN OPPOSITION TO SCE&G'S
Regulatory Staff for Rate Relief to	)	MOTION TO DISMISS
SCE&G Rates Pursuant to	)	
S.C. Code Ann. § 58-27-920	)	
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The Attorney General submits this Brief as Intervenor in opposition to SCE&G's Motion to Dismiss. Our submission herein is consistent with the Attorney General's opinion of September 26, 2017, as well as the Petition of the Office of Regulatory Staff (ORS) which references and relies upon this Opinion. Indeed, the September 26, 2017 Opinion is incorporated herein by reference and we expound upon that opinion below. For these reasons, and the other reasons referenced in the ORS Request, the SCE&G Motion to Dismiss and Motion to Strike should be denied. In addition, pursuant to the Attorney General's statutory obligation pursuant to § 1-7-110 to "consult with" and "advise" the Commission, we offer this further elaboration of our September 26 Opinion, relating to the constitutionality of the Base Load Review Act (BLRA), for the Commission's further guidance. The Attorney General fully supports the ORS Request.

As we assert in this Brief, the Attorney General strongly believes that the BLRA unconstitutionally deprives SCE&G ratepayers of the right to have utility rates regulated in the "public interest," as well as the right to due process and equal protection. Moreover, the

property of SCE&G ratepayers, in the form of excessive rates, has been “taken” without just compensation in violation of the federal and State Constitutions. SCE&G has made clear its intention to abandon these unfinished plants, which have already cost ratepayers billions of dollars and customers are continuing to be charged with no end in sight. The result of these constitutional deprivations – which the BLRA has imposed in the form of exploitative rates – is that an SCE&G ratepayer has witnessed an enormous increase in his or her utility bill with nothing to show for it. The reality is there are no new nuclear plants, only an abandoned site. See Attachment A [documenting SCE&G rate increases as the result of the BLRA]. We thus respectfully ask the Commission to correct this intolerable situation as the ORS has requested in its Petition. For the reasons set forth below, the Motion to Dismiss by SCE&G should be denied and the ORS Request should be granted.

**The PSC’s Power to Address The BLRA’s  
Unconstitutionality As Applied**

SCE&G seeks to dismiss the ORS petition on a number of grounds. Among those is that the BLRA deprives ratepayers of no constitutional rights and that the Act is valid in all parts. SCE&G contends that the Attorney General raises a facial challenge to the Act entirely, and thus “there would be no basis for the Commission to rule it to be unconstitutional.” Brief of SCE&G at 17.

We disagree. SCE&G’s efforts in its Brief to dismiss the ORS Petition are unavailing. Let’s be clear. We are not asking the Commission to “strike down” the Act as a court would or could. That the Commission cannot do. See Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 342 S.C. 34, 28, 535 S.E.2d 642, 644 (2000). [ALJ’s “are an agency of the executive branch of government” and “have no authority to pass upon the constitutionality of a statute or regulation. . . .”] However, this Commission is authorized to address the unconstitutionality of

the BLRA as applied to SCE&G ratepayers. That is all we ask here. In Travelscape, LLC v. S.C. DOR, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011), our Supreme Court distinguished Video Gaming Consultants and concluded that Dorman v. Dept. of Health & Envtl. Control, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002) and Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) struck the correct balance with respect to an administrative agency's ability to consider constitutional issues. The Supreme Court thus approved the analysis in those cases. ["We find the principle enunciated in Dorman and Ward to be sound. . . ."]

Travelscape quoted Dorman with approval, noting that "[W]hile it is true that AL[C]'s cannot rule on a facial challenge to the constitutionality of a regulation or statute, AL[C]'s can rule on whether a law as applied violates constitutional rights. '" Travelscape, 391 S.C. at 109, 705 S.E.2d at 38 (quoting Dorman, 350 S.C. at 171, 565 S.E.2d at 126). In Ward, the Supreme Court had stated that:

ALJ's [cannot] rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated. . . . [M]erely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.

Ward, 348 S.C. at 18, 538 S.E.2d at 247. See also Evans v. State, 344 S.C. 60, 67, 543 S.E.2d 547, 551 (2004) ["We conclude the DOR has the jurisdiction and authority to rule on State Retirees' constitutional claims." (citing Ward)]. Thus, the existing precedents strongly support the authority of the PSC to address the issue of whether the BLRA is unconstitutional as applied to SCE&G ratepayers and whether the Act deprives ratepayers of constitutional rights.

This Commission has on many occasions adhered to just such an approach. In numerous orders, the PSC has "rule[d] on whether a party's constitutional rights have been violated. . . ." See, e.g. In re Greenville Co. Power, LLC, 2002 WL 31487838 (May 17, 2002) [PSC rules on whether it violates the Company's constitutional rights to due process and equal protection; "The

Company states that we applied an interpretation of the Utility Facility Siting and Environmental Protection Act entirely different” from other Certificate applications]; In re Berkeley Elec. Coop., Inc., 1990 WL 10711218 (April 3, 1990) [PSC decides whether there is a violation of Art. VIII, § 15 of the South Carolina Constitution]; Re United Utilities Companies, Inc., 2011 WL 2573070 (March 4, 2011) [PSC rules on alleged due process issue, rejecting the argument that “the Commission violated its due process rights”]; Re Carolina Water Service, Inc., 2005 WL 4701937 (October 17, 2005) [“No due process rights were violated in this context, since a wide range of rates of return were presented in testimony at the hearing on this matter, and these ranges were subject to cross-examination, including some in the 1% range.”]; In re Application of Bell South Telecommunications, Inc. for a Certificate of Public Convenience and Necessity, 2005 WL 7149822 (March 24, 2005) [Commission refuses to adopt a settlement because “[a]pplying the settlement to all parties without a hearing violates the due process rights of the non-agreeing parties.”]. Moreover, the PSC does not engage in retroactive rate-making when it orders refunds for unlawfully imposed rates. Hamm v. Central States Health and Life Co. of Omaha, 299 S.C. 500, 505-06, 386 S.E.2d 250, 253-54 (1989).

Thus, while the Commission may not rule on the facial unconstitutionality of the BLRA, it may find that SCE&G ratepayers’ constitutional rights have been violated by application of that Act. And, it may grant the relief requested by ORS. For the reasons set forth below, we respectfully request that SCE&G’s Motion to Dismiss be denied.

**The Interest of the Attorney General on Behalf of  
The Citizens and the Public**

Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State’s chief legal officer, possessing broad authority to direct and control the State’s legal affairs. In State ex rel. Wolfe v. Sanders, 118 S.C. 498, 110 S.E. 808, 810 (1920), the South

Carolina Supreme Court recognized that the Attorney General “is the highest executive law officer of the State,” who is “charged with the duty of seeing to the proper administration of the laws of the State, and his duties are quasi-judicial.”

Moreover, in State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002), the Court upheld the authority of the Attorney General to sue the Governor and other constitutional officers in order to enforce the State Constitution. The Court quoted with approval State el rel. Daniel v. Broad River Power Co., 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), aff’d, 282 U.S. 187 (130), a case in which the Attorney General brought an action in the original jurisdiction on behalf of citizens to require SCE&G to maintain its street car system. In Broad River Power, the Supreme Court recognized the authority of the Attorney General as follows:

[a]s the chief law office of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain all such suites and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order and the protection of public rights.

Pursuant to this sweeping authority, the Attorney General may challenge the constitutionality of a statute on behalf of the citizens in general. State ex rel. McLeod v. McInnis, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982) [“The Attorney General by bringing this action in the name of the State speaks for all its citizens and may in their behalf bring to the Court’s attention for adjudication charges that there is an infringement . . . (of the Constitution.)”]. And, in Condon v. State, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003) the Court stated that it “has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the Sate and its citizens, including vindication of wrongs committed collectively against the citizens of the State.” Thus, the Attorney General represents the public interest and may, where necessary to protect the

public interest, bring to the attention of a court or a quasi-judicial body, such as the PSC, violations of citizens' constitutional rights. We ask that the PSC do so here and thus the SCE&G Motion to Dismiss should be denied.

Furthermore, Section 1-7-110 also requires the Attorney General to "consult and advise" with the Public Service Commission "on questions of law relating to their official business." Thus, the Attorney General is, in this proceeding, bringing to the attention of the Commission the serious constitutional concerns he has regarding the application of the BLRA to ratepayers and to the public at large. Failed nuclear power plants, in which the citizens must bear all the costs, is, most certainly, contrary to the public interest.

**ORS Request States A Claim For Relief And  
SCE&G'S Motion To Dismiss Should Be Denied**

As was stated in Cowart v. Poore, 337 S.C. 359, 363-64, 523 S.E.2d 182, 184-85 (Ct. App. 1999), regarding a Motion to dismiss,

[t]he ruling on a Rule 12(b)(6) SCRC Motion to dismiss must be based solely upon the allegation set forth in their complaint. State Bd. Of Med. Exam'rs v. Fenwick Hall, Inc., 300 S.C. 274, 387 S.E.2d 458 (1990). On review, the Motion will not be sustained if the facts alleged, and the inferences reasonably deducible therefrom, would entitle the plaintiff to relief on any theory of the case. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987). The question to be considered is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

(emphasis added). See also 10 S.C. Code Ann. Regs. 103-829. SCE&G agrees that this is the governing standard for a Motion to Dismiss. See SCE&G Brief at 3-4.

ORS's request for relief is based upon, among other authorities, § 58-27-920. See paragraph 1 of Request for Rate Relief. As support for ORS's request, Paragraphs 13, 14, 15 and 16 reference the Attorney General's Opinion of September 26, 2017, which concluded that many

portions of the BLRA are unconstitutional as applied to SCE&G ratepayers. Pursuant to Paragraph 16, ORS alleges: “Based on ORS’s review of the Attorney General Opinion, it is not just and reasonable or in the public interest to allow SCE&G to continue collecting revised rates.”

As discussed above, under South Carolina case law, the PSC may consider whether constitutional rights are being violated and may determine whether a statute is unconstitutional as applied. See Travelscape, supra; Ward, supra; Dorman, supra and Evans, supra. A Motion to dismiss must be denied based upon “any theory of the case.” Cowart, supra. Further, it is not retroactive ratemaking if the rates were assessed under an unconstitutional law. See Hamm, supra. Based upon ORS’s Petition, as well as the constitutional principles set forth below, we believe that indeed SCE&G ratepayers have been deprived of their constitutional rights as a result of application of the BLRA. Thus, the SCE&G Motion to Dismiss should be denied.

More specifically, SCE&G’s arguments that the rates imposed by the BLRA may only be challenged once, that they have already been litigated, and that ORS has been present in all proceedings, are unavailing. See SCE&G Brief at 27-28.

Here, the unconstitutional application of the BLRA is now being asserted by the Attorney General on behalf of the public. As discussed, the Attorney General, as the State’s chief legal officer, and who was not present in earlier proceedings, may challenge the unconstitutional application of the BLRA. See State ex rel McLeod v. Yonce, 274 S.C. 81, 261 S.E.2d 303 (1979) [Attorney General successfully questioned the constitutionality of a statute which authorized the Supreme Court to appoint a circuit judge to preside over utility cases]; State ex rel Condon v. Hodges, supra. We stated in Op. S.C. Atty. Gen., 1975 WL 22406 (Sept. 8, 1975), that “statutory and common law authorities would enable the attorney general and his assistants

to appear before the Public Service Commission in rate-making-matters in the public interest as advocates of the public's consumer interest and/or as legal counsel of the commission." That is the Attorney General's role here.

The issues which we raise- the unconstitutionality of the BLRA as applied to SCE&G ratepayers- have not been argued to the Commission before. SCE&G admits this. SCE&G Brief at 15. Nor were these constitutional issues argued to the Supreme Court in SC Energy Comm. v. SC PSC, 410S.C. 348, 764 S.E.2d 913 (2014). In any event, the Attorney General was not a party in that case, nor in the other cases before the Supreme Court involving the BLRA. The issue of constitutionality goes to the legality of the rates themselves, not the Commission's traditional discretionary ratemaking function. Thus the Commission, may consider these arguments now, contrary to SCE&G's contentions otherwise.

Hamm v. Central States Health and Life Ins. Co. of Omaha, *supra*, squarely addresses this issue. There, the Court held that unlawful rates "would not be considered retroactive ratemaking." 299 S.C. at 505, 386 S.E.2d 253. Consumer Advocate Hamm cited two previous decisions which supported his position that rates imposed earlier could be challenged subsequently because those rates were unlawful. The Court considered these two cases, Parker v. SC PSC and SCE&G, 280 S.C. 310, 313 S.E.2d 290 (1984) (Parker I), and Parker v. SC PSC and SCE&G, 285 S.C. 231, 328 S.E.2d 909 (1985) (Parker II), to be directly on point. In Hamm, the Supreme Court thus concluded that "the Commissioner would not be engaging in retroactive ratemaking by ordering refunds where the approved rates were appealed and found to be unlawfully established." 299 S.C. at 506, 386 S.E.2d at 204. According to the Hamm Court, "unlawfully established" rates, even those established years earlier, are those to which the Company "was never entitled." Id.



As already discussed, this Commission is empowered to determine that constitutional rights were violated by earlier actions. Travelscape, supra; Evans, supra. Thus, the rationale of Hamm and the two Parker cases are applicable to the Commission in this proceeding. While those cases involved appeals from the Commission, the Commission itself is also empowered to rectify the unconstitutional and illegal application of the BLRA. Accordingly, SCE&G's arguments in support of its Motion to Dismiss are without merit.

Further, SCE&G's contention that ratepayers lack a "legally cognizable" interest to raise a "Takings" claim is also misplaced. The Attorney General certainly possesses such an interest to challenge the BLRA under the "Takings" Clause, as discussed above. State ex rel Condon v. Hodges, supra; State ex rel Daniel v. Broad River Power Co., supra. In the latter case, the Attorney General challenged the actions of Broad River Power on behalf of the public and customers for failure to perform its public duties under the Acts of incorporation of the utility. The Court emphasized that "[w]here the injury sought to be redressed is public in its nature," the Attorney General can act "in his own relation against a private corporation, even though the wrong complained of results in private as well as public harm." 157 S.C. at 68, 153 S.E. at 560. There is, thus, no doubt that the Attorney General may now raise all these constitutional issues, including the "Takings" claim.

As Judge Bork wrote for the majority in Jersey Central Power and Light v. FERC, 810 F.2d 1168, 1181 (D.C. Cir. 1987), "exploitative rates are illegal" under the "Takings Clause" of the federal Constitution. Illegal rates or rates which contravene the law are, as our Supreme Court has recognized, a "nullity" and may be corrected. Coney v. S.C. Telephone Co., 169 S.C. 334, 168 S.E. 731, 732 (1933). Accordingly, should this Commission conclude that unconstitutional rates have been imposed upon SCE&G ratepayers by the BLRA, certainly, the

Commission may take action as appropriate to redress those unconstitutional rates. Thus, SCE&G's Motion to Dismiss should be denied.

### **SUMMARY OF ARGUMENT**

In the view of the Attorney General, the BLRA is riddled with constitutional flaws. Unfortunately, the Act, as applied to SCE&G ratepayers, requires a utility and its investors to be paid "up front" by customers in order to finance the construction of exorbitantly expensive nuclear power plants. Little, if any, due process is afforded to the consumer prior to the Act's annual increases, costing ratepayers well over a billion dollars. Only nuclear power can take full advantage of the Act; other baseload power sources are excluded. Prudence, normally a major issue in rate matters, is simply assumed by the Act. All the safeguards which usually protect consumers, such as the "used and useful" rule or a full rate hearing prior to a rate increase are eliminated. SCE&G admits that the BLRA does "not make the used and useful test operative for revised rate orders." SEC&G Brief at 26. Such an approach – one requiring that customers "pay now and hope the plant is finished later" – opens the door to unchecked, wasteful spending and even encourages and rewards abandonment of the facility. The Act was clearly drafted for the benefit of the utility and its investors, leaving SCE&G's customers holding the bag. As such, the Act does not regulate public utilities "in a manner consistent with the public interest," as the Commission has concluded it must, in order to meet the requirements of Art. IX, § 1 of the South Carolina Constitution. In Re Carolina Water Service, 2007 WL 4944726 (Nov. 19, 2007).

As one Judge has observed, a "prudent investment" approach, such as the BLRA employs, "thrust[s] the entire risk of a failed investment onto ratepayers." Jersey Cent. Power & Light Co. v. FERC, 810 F.2d at 1212 (Mikva, J., dissenting). The "prudent investment" rule is one in which "the utility is compensated for all prudent investments at the actual cost when made

(their ‘historical’ cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight.” Pursuant to this methodology, which South Carolina has never used, “utilities incur fewer risks but are limited to a standard rate of return on the actual amount of money invested.” Duquesne Light Co. v. Barasch, 488 U.S. 299, 309 (1989). With the BLRA, a utility such as SCE&G, incurs virtually no risk and receives great reward.

Justice Brandeis proposed this “prudent investment” alternative to the longstanding “fair value” of “used and useful” property methodology, which South Carolina has always employed, and which ensures “just and reasonable” rates and thus is not a “taking” of either the utility’s or ratepayers’ property. Brandeis offered prudent investment as a constitutional replacement in his dissenting opinion in Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm’n, 262 U.S. 276, 291 (1923) (dissenting opinion). However, the “prudent investment” methodology was rejected by the majority in Southwestern as a constitutional requirement. According to the majority of the Court, in order to assess rates, “[t]here must be a fair return upon the reasonable value of the property at the time it is being used for the public.” 262 U.S. at 281 (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 41 (1909)). Otherwise, the rate is confiscatory to the utility. Again, in Duquesne, the prudent investment methodology failed to convince the Court that it should assume constitutional status.

As will be discussed below, such an approach was rejected by this Commission in Re Madera Utilities, 2004 WL 1714912 (June 15, 2004) and our State Supreme Court has never hinted at adoption of a rule of prudent investment. As one authority has written, historically there has instead been the “predisposition [ ] of legislatures and commissions toward original cost ratemaking....” Hoecker, “Used and Useful: Autopsy of Ratemaking,” 8 Energy L.J. 303, 310 (1987). Despite its popularity in some academic circles, “. . . as courts have long recognized

the prudent investment rate base principle ‘was not to become the prevailing rule.’” Id. (quoting Dem Cen. Comm. of D.C. v. Wash. Metropolitan Area Transit Comm., 485 F.2d 786, 801 (D.C. Cir. 1973)).

Thus, SCE&G’s argument in its Motion to Dismiss Brief that the BLRA is constitutional is in error and its Motion should be denied. Specifically, the Act, as applied to SCE&G ratepayers, denies due process, equal protection and it “takes” ratepayers property without just compensation. Rather than protect ratepayers, it exploits them by imposing exorbitant rate increases. The Act’s application overwhelmingly promotes the “private” interest of the utility, rather than the interest of the ratepayer or the public interest, in violation of Article IX, § 1 of the State Constitution. SCE&G admits that the “implicit bargain” of the BLRA was to “ensure that [its]... investors were repaid.” SCE&G Brief at 23. But, as one court has recognized, it is the duty of the regulatory Commission to protect the “public interest” and “responsibly exercise its authority to ensure that the citizens of this State will not be charged excessive rates....” Turpen v. Oklahoma Corp. Comm., 769 P.2d 1309, 1367 (Okla. 1988) (Wilson, J. dissenting). Yet, the BLRA utterly fails to protect the public interest.

As early as February, 2007, as the BLRA was being introduced in the General Assembly, the legislation’s purpose was described candidly as an effort to “more easily pass [ ] on to ratepayers” the astronomical costs of constructing these nuclear plants. Attachment B (Columbia, State, February 18, 2007). And, as an SCE&G spokesman accurately summarized the Act in 2014, “[o]nce a revised schedule and cost estimate are complete, if the schedule and/or the capital costs were to exceed what is currently approved by the Public Service Commission of South Carolina, we would expect to petition the PSC for an order to update the construction

milestone and capital cost schedules.” Attachment C (Columbia State, October 3, 2014). The 2014 article then continued:

[t]he Base Load Review Act provides that the commission would grant the petition as long as it is determined that the change is not the result of imprudence on our part. At that point, we would assess the potential impact on future rate adjustments under the BLRA,” Boomhower said. Last week, SCE&G residential customers were hit with an average \$49 a year increase on their electric bills starting this month – the seventh rate increase passed along to customers since construction of the new reactors began in 2008.”

Id. This article was written in 2014. There were, of course – thanks to the BLRA – more rate increases to come. The plants’ construction was shut down and the facilities were abandoned this past summer.

In 2010, while construction was ongoing and the utility was reaping its costs of financing from ratepayers, Justice Hearn correctly foreshadowed the ills caused by the BLRA, noting that the legislation leaves no “mechanism in place [for ratepayers] to challenge the prudence of SCE&G’s financial decisions.” Energy Users Comm. v. SCE&G, 388 S.C. 486, 496, 697 S.E.2d 587, 592 (2010). Her assessment regarding the lack of due process provided by the Act has proven to be prophetic.

Then, in 2014, the flaws in the Act came to the fore as our Supreme Court again interpreted this legislation. This time, it construed the Act as not permitting a proceeding for “material and adverse deviation” from the project’s schedules, estimates and projections except “after a utility has already deviated from an existing base load order, and then the utility may only recoup costs that were not the result of imprudence.” In the words of the Supreme Court, the Act permits modification of the initial order to “update the capital costs and construction schedules.” South Carolina Energy Users Comm. v. S.C. Pub. Serv. Comm., supra. In the Supreme Court’s opinion in that case, “the General Assembly anticipated that construction costs

could increase during the life of the project,” and thus ““SCE&G may petition the Commission for an order modifying rate designs.”” *Id.* at 356-57, 764 S.E.2d at 917 (quoting S.C. Energy Users Comm. v. SCE&G, 388 S.C. at 496, 697 S.E.2d at 592-93). Thus, under the terms of the BLRA, once the base load order has been granted, “update” rate increases to that order must be routinely awarded without any opportunity for ratepayers to be heard by contesting the rate increases as in a general rate case. Therefore, the Act represents a complete departure from the typical “rate case.”

Further, in the 2014 Energy Users case, the Court held that the Act requires that, once the prudence of the project itself is determined in the initial order, SCE&G’s prudence to initiate the project cannot be challenged again. According to the Court, it would be “nonsensical” to allow such a challenge at the “modification” stage proceeding because ““update proceedings are likely to be a routine part of administering BLRA projects going forward”” and any further challenge of prudence would be countervailing to the BLRA’s purpose. 410 S.C. at 359, 764 S.E.2d at 918-19. The Court acknowledged this cutoff of a further prudence challenge was a significant change from previous law, as the BLRA sought to “cure ... relitigation” of prudence. *Id.*

Accordingly, in essence, the Act bestows all the benefits upon the utility and imposes all the liabilities upon the consumer. Compare Duquesne Light Co. v. Barasch, 488 U.S. 299 at 315 (1989) [requiring “investors to bear the risks of bad investments at some times while denying them the benefits of good investments at others” possibly raises constitutional questions.]. But as one court has explained, “[t]he Commission cannot fulfill its statutory duty to balance the competing interests of stockholders and ratepayers without taking into account the interests of ratepayers by considering the impact of proposed rates on ratepayers.” Citizen Util. Bd. v. Illinois Commerce Comm., 658 N.E.2d 1194, 1200 (Ill. 1995). The BLRA does not allow any

such “balancing,” because the statute shifts the financial burden from SCE&G investors and stockholders to its customers. Yet, no meaningful due process opportunity is provided to challenge the company’s financial judgment after the initial base load order has been rendered. Even if a ratepayer or a ratepayer’s group was not a party in the initial base load review proceeding, he or she is, nevertheless, bound by that order and is foreclosed from contesting it – even for the first time. Indeed, once such an order is rendered, the plant under construction is deemed “used and useful” as a matter of law – a determination which does not comport with reality because the initial order is issued even before construction begins. Characterizing a plant as “used and useful,” long before it has been completed and is providing service to customers, is a radical departure from longstanding South Carolina law. To call this statutory scheme one-sided – in favor of the utility – is a major understatement, to say the least.

Thus, one of the principal purposes of the Act, as stated in its Title – that of protecting ratepayers “from responsibility of imprudent financial obligations or costs” – is contradicted by the text of the legislation. From the issuance of the base load order throughout, the Act saddles ratepayers with ever increasing rates, and possesses no real mechanism to stop the process until the utility itself decides to abandon the project. Even upon abandonment, so long as abandonment is prudent, the utility receives its costs and a significant return, as if the plant had been finished and was providing service to its customers. As the United States Supreme Court has written, “[t]he public cannot properly be subjected to unreasonable rates in order that stockholders may earn dividends.” Covington and L. Turnpike Road Co. v. Sanford, 164 U.S. 578, 596 (1896). Therefore, the BLRA does not constitute the regulation of a utility “required by the public interest” in accordance with Art. IX, § 1 of the South Carolina Constitution as that Act is applied to SCE&G ratepayers. Instead, while the BLRA may have ultimately been designed to

benefit future ratepayers of SCE&G, – at least in theory – there is little question that it tilts overwhelmingly against that utility’s present ratepayers and in favor of SCE&G and its investors. Such violates Art. IX, § 1 of the South Carolina Constitution, as legislation primarily in the utility’s and stockholder’s interest, and thus contrary to the “public interest.” See Continental Oil Co. v. Fed. Power Comm’n., 378 F.2d 510, 532 (5<sup>th</sup> Cir. 1967) [the public interest places a “strong emphasis on consumer interest” which protects “from the outset against excessive rates and charges.”].

In addition, the Act fails to afford meaningful due process to ratepayers. The BLRA forecloses any challenge whatsoever to the prudence of the project itself after the initial proceeding leading up to the base load order. Instead, the Act makes the initial prudence determination “final and binding” on everyone, and from then on. Our Supreme Court has struck down a statute which forecloses subsequent challenges to an initial determination as violative of due process. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2014). As the United States Supreme Court recognized in In re Permian Basin Rate Cases, 390 U.S. 747, 791 (1968), the regulatory body is “obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection. . . .” The BLRA utterly fails in this constitutional requirement. A ratepayer who was uninvolved in the initial base load review proceeding is prohibited from any challenge to the projects prudence. Thus, the most basic principles of due process are violated.

Moreover, these so-called “updates,” resulting in annual rate increases pursuant to § 58-33-280, provide ratepayers no opportunity whatever to be heard to protest these increases other than the submission of “comments” in writing. The Mississippi Supreme Court, in Miss. Power Co., Inc. v. Miss. Pub. Serv. Comm., 168 So.3d 905, 914 (Miss. 2015), concluded that ratepayers



had been denied procedural due process, pursuant to that State's base load review act, because consumers received no notice and were thus deprived of "particip[ation] at every stage of these proceedings. . . ." Our own Supreme Court similarly held that ratepayers did not receive due process pursuant to Art. I, § 22 of the State Constitution with respect to a rate increase because they received inadequate notice. See Porter v. South Carolina Pub. Serv. Comm., 338 S.C. 164, 170, 525 S.E.2d 866, 869 (2000). According to the Court, "the public was completely deprived of an opportunity to be heard." Id. We submit that the written comments allowed by § 58-33-280 are woefully inadequate for due process purposes. See Barasch v. Pa. Pub. Util. Comm., 546 A.2d 1296, 1306 (Pa. 1988) [opportunity to make comments is insufficient due process].

Further, the BLRA is discriminatory in several ways. Nuclear power plants receive the full benefits of the Act, whereas other base load-capable sources of energy either are treated differently or left out of the Act altogether. Such omission or disparate treatment of other sources of power, including hydroelectric, natural gas, coal and alternative energy sources, such as solar – all fully capable of base load output – is arbitrary and not rationally related to the purposes of the Act, "the recovery of prudently incurred costs associated with new base load plants. . . ." See Section 1(A) of Act No. 16 of 2007. Such arbitrary underinclusiveness of the Act violates Equal Protection. See Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978) ["While the General Assembly has the power in passing legislation to make a classification of citizens, the constitutional guaranty of equal protection requires that all members of a class be treated alike, under similar circumstances and conditions and that any classification cannot be arbitrary and must bear a reasonable classification to the legislative purpose sought to be effected."]. There is no rational basis for the BLRA to exclude other sources of power capable of base load generation and thereby treat nuclear power so favorably.

In essence, nuclear base load power is treated one way, allowing capital costs to be recovered “up front” instead of according to the usual “original cost” upon “used and useful” property methodology, while all other forms of base load power generation is treated in the “traditional” way, excluded from the advantages (to a utility) of the BLRA. See also Doe. v. State of South Carolina, \_\_\_ S.E.2d \_\_\_, Op. No. 27728 (November 17, 2017). The result of this discrimination is that customers of a utility which utilize the BLRA (here, SCE&G) are saddled with the continuously increasing rates without a rate proceeding, while consumers of a utility not eligible for the BLRA are not.

Moreover, not only does the BLRA unconstitutionally prefer nuclear power over other base load power sources, it also discriminates against present ratepayers of a BLRA utility and in favor of its future ratepayers. By adopting a “prudent investment” methodology, and completely discarding South Carolina’s longstanding “original cost” of “used and useful” property ratemaking system – a system which this Commission has long employed – in the single setting of building nuclear power plants, the BLRA is arbitrary as applied. The “used and useful” system for determining the rate base has always served to protect a utility’s current ratepayers, ensuring that they pay rates only on present service. The system of “fair value” of “used and useful” property has historically been a staple of ratemaking in South Carolina, dating back at least to the 1930’s. See e.g. DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 333 (1934) [rates determined by a “fair return on the value of [utility’s] property in the service of its customers. . . .”]. Yet, the BLRA arbitrarily redefines “used and useful” in § 58-33-275(A) to create the “fiction” that the plant has achieved the status of “used and useful” from the issuance of the base load review order. Thus, present ratepayers of a utility, such as those of SCE&G, end

up paying ever increasing rates on non-used and useful property, and without reaping the benefits of an operating plant. Such disparate treatment clearly violates Equal Protection.

Finally, the Act contravenes the “Takings” Clause of both the federal and State Constitutions. The Act is heavily one-sided in favor of the utility and its investors and against ratepayers. Thus, it constitutes a “taking” of ratepayer’s property in violation of Fed. Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) [the federal “takings” clause requires “the fixing of ‘just and reasonable’ rates [which] involves a balancing of the investor and consumer interests. . . .”]. See also Jersey Cent. Power and Light Co. v. FERC, 810 F.2d at 1190 (Starr, J. concurring) [determination of prudence and used and useful principles are safeguards to ensure that ratepayer’s property is not “taken” by saddling them “with the results of management’s defalcations or mistakes” or “as a matter of simple justice be required to pay for that which provides the ratepayers with no discernible benefit.”]; S.C. Cable TV Assn. v. PSC, 313 S.C. 48, 51, 437 S.E.2d 38, 39 (1993) [“it is the PSC’s statutory duty to set rates which are just and reasonable . . . [which are] set by balancing the interests of the ratepayer and the right of the utility to earn a fair return.”]; Mims v. Edgefield Co. Water and Sewer Auth., 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983) [ratemaking focuses “upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility’s customers.”].

No such “balance” can possibly result in application of the BLRA. While the Hope decision does not mandate a particular methodology, to be sure, it does require a proper balance between the utility and customers so as to produce “fair and reasonable” rates. As Judge Bork stated in the majority opinion in Jersey Central, Hope “makes clear that exploitative rates are illegal. . . .” 810 F.2d at 1180. The thrust of the BLRA is to transfer property from SCE&G

ratepayers to SCE&G for the utility's and its stockholders' private use. These ratepayers have received nothing in return, because the Act allows the utility to abandon the project with little or no repercussions. Such is a "taking," not only pursuant to the Fifth Amendment of the federal Constitution, but also in violation of Art. I, § 13 of the South Carolina Constitution. See Edens v. City of Cola., 228 S.C. 563, 9 S.E.2d 280 (1956) [private property cannot be taken except for public use]. Thus, the Motion to Dismiss should be denied.

### **The Powers of the Public Service Commission in Ratemaking**

As this Commission well understands and appreciates, "the regulation of utilities is one of the most important of the functions associated with the police power of the states." Ark. Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm., 461 U.S. 375, 377 (1983). The Commission is a quasi-judicial body with the responsibility to "supervise and regulate" rates and service and "to fix just and reasonable standards, classifications, regulation practices and measurements of service." Utilities Serv. of S.C., Inc., v. S.C. ORS, 392 S.C. 96, 105, 708 S.E.2d 755, 760 (2011) (quoting S.C. Code Ann. § 58-3-140(A) (1976 and Supp. 2010)). As our Supreme Court stated in Hamm v. Pub. Service Comm., 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986), "[t]he Public Service Commission is the 'expert' designated by the legislature to make policy determinations regarding utility rates; the role of the Court reviewing such decisions is very limited. " (quoting Patton v. S.C. Pub. Serv. Comm., 280 S.C. 288, 312 S.E.2d 257 (1984). Rates set must be "just and reasonable" by "balancing the interests of the ratepayers and the right of the utility to earn a fair return." S.C. Cable T.V. Assn. v. Public Serv. Comm. of South Carolina, 313 S.C. at 51, 437 S.E.2d at 39 (1984); Mims v. Edgefield County Water and Sewer Auth., supra ["... the reasonableness of the rates should be determined by an evaluation of the utility's holdings and obligations and the return which the utility realizes from the rates. . . . The

focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility's customers.”] (citing Bluefield Water Works and Improvements Co. v. Public Service Comm. of West Virginia, 262 U.S. 679 (1923); and Smyth v. Ames, 169 U.S. 466 (1898)).

In utility ratemaking, “[t]he public interest is to be given paramount consideration; desires of a utility are secondary.” In The Matter of Application of Rule Radiophone Serv. Inc. v. Rule Radiophone Serv. Inc., 621 P.2d 241, 246 (Wyo. 1980). And, as our own Supreme Court noted almost seventy years ago,

[w]hen the rights and interest of the public as a whole and its private citizens or its corporations conflict, the rights and interest of the latter must yield to the rights and interests of the public; and competition may be restrained by the courts only when it is unlawful competition which this is not, even if it results in practical confiscation of the business and property of private corporation and individuals.

SCE&G v. S.C. Pub. Serv. Auth., 215 S.C. 193, 205, 54 S.E.2d 777, 782 (1949) (emphasis added). The function of the Commission in setting utility rates is to serve the “public interest.”

As our Supreme Court has noted, “[t]he PSC may determine – independent of any party – that an expenditure is suspect and requires further scrutiny.” Utilities Serv. of S.C., Inc. v. ORS, 392 S.C. at 106, 708 S.E.2d at 761. See § 58-5-210 [“the (PSC) is . . . vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, observed and followed by every public utility in this State. . . .”] (emphasis added). The Commission’s role is to ensure that “improper or unreasonable costs are not passed on to ratepayers.” Kiawah Prop. Owners v. Pub. Serv. Comm. of S.C., 357 S.C. 232, 239, 593 S.E.2d 148, 152 (2004). Certainly, unconstitutionally imposed rates meet the characterization as

“improper.” The PSC “has wide latitude to determine its methodology in rate-setting. . . .” *Id.*, 357 S.C. at 241, 593 S.E.2d at 153. While not a court, nevertheless, the PSC is the “arbiter of the reasonableness of rates charged by public utilities.” Carolina Water Service v. South Carolina PSC, 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978). As the Court recognized in Carolina Water Service, a body, such as the Commission, “. . . is not in a strait jacket in the administration of laws under which it operates.” *Id.* (quoting Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948)). And, in Re Georgia Water and Well Services, 2004 WL 1372843 (April 7, 2004), the Commission stated:

[f]or ratemaking purposes, only just and reasonable expenses are allowed, only used and useful property (with certain exceptions) is permitted in the rate base.

The Public Service Commission has wide latitude to determine an appropriate rate-setting methodology. Heater of Seabrook v. Pub. Serv. Comm. of South Carolina, 324 S.C. 56, 64, 476 S.E.2d 826, 830 (1996).

Finally, as discussed above, and contrary to SCE&G’s argument otherwise, the Commission possesses the authority to determine that a statute, such as the BLRA, is unconstitutional as applied to ratepayers or others. See Travelscape LLC v. SC DOR, *supra*. An agency, such as the Commission, “has the jurisdiction and authority to rule on [ratepayers’] constitutional claims. Evans v. State, *supra*. Accordingly, the PSC may determine that SCE&G ratepayers have been deprived of their constitutional rights as a result of application of the BLRA.

## **ART. IX, § 1 OF THE SOUTH CAROLINA CONSTITUTION**

### **Southern Bell Decision Incorporates “Bluefield-Hope” Analysis**

We ask the Commission to review Art. IX, § 1 of the South Carolina Constitution in the context of the excessive rates which the BLRA imposes upon SCE&G’s ratepayers. The

Attorney General contends that the BLRA dramatically – even radically – alters the “balance” between the utility and its investors on the one hand, and SCE&G’s customers on the other. This Commission has long ensured this “balance” in accordance with the decisions of the South Carolina Supreme Court, and has protected the public interest by applying the so-called “Bluefield-Hope” analysis, in accordance with Southern Bell v. Pub. Service Comm., 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978) [citing Bluefield Water Works and Improvement Co. v. Pub. Serv. Comm. of West Va., *supra* and Fed. Power Comm. v. Hope Nat. Gas Co., *supra*]. In Southern Bell, the Court defined a utility’s “rate base” as the “total investment in, or fair value of, the used and useful property which it necessarily devotes to rendering the regulated services.” 270 S.C. at 600, 244 S.E.2d at 283. Even this year, the Court held steadfast to that same standard for determining a rate base in Daufuskie Island Utility Co. v. South Carolina Office of Regulatory Staff, 420 S.C. 305, n. 4, 803 S.E.2d 280, 283, n. 4 (2017). Throughout South Carolina’s history, this has been the law in South Carolina.

Southern Bell also referenced Bluefield and Hope as the “two leading cases setting forth the basic principles of utility rate regulation. . . .” These two cases are landmark decisions regarding the constitutional requirements for a utility’s rate of return. The Southern Bell Court quoted with approval Bluefield’s language, which stated that “[a] public utility is entitled to such rate as will permit it to earn on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. . . .” 270 S.C. at 595-96, 244 S.E.2d at 281 (emphasis added). Southern Bell also quoted language from Hope, noting that “it is the result reached not the method employed which is controlling” and that “just and reasonable rates require the

balancing of the investor and consumer interests.” 270 S.C. at 596, 244 S.E.2d at 281. This “Bluefield-Hope” analysis, requiring the “balancing” of investor and consumer interests has historically and consistently been applied by the South Carolina Supreme Court, as well as this Commission, to reach a “just and reasonable” rate of return on used and useful property as Bluefield and Hope require. Such principles were employed in South Carolina long before Art. IX, § 1 was adopted, and have been applied consistently since. This “balancing” of investor and consumer interests to produce “just and reasonable rates” is thus what is meant by regulation of rates in the “public interest,” as prescribed by Art. IX, § 1 of the State Constitution.

Yet, the BLRA abandons these fundamental principles, designed to protect the utility and especially the ratepayer, in the single setting of building nuclear power plants. Instead, the BLRA allows, through a form of “prudent investment,” the utility to recover “up front” the costs of financing the construction of such plants under a “prudent investment” methodology. Such plants are nowhere near completed at this point and likely never will be. In similar circumstances, involving a state constitutional provision which expressly requires a methodology similar to that which South Carolina has long employed – both before and after Art. IX, § 1’s adoption – the Arizona Supreme Court held that use of a prudent investment methodology was inconsistent with that state’s constitution. Simms v. Round Valley Light and Power Co., 294 P.2d 378 (Ariz. 1956). The Arizona Supreme Court concluded that the “fair value” on used and useful property methodology was written into its Constitution so that its Commission “might act intelligently, justly and fairly . . . in arriving at just and reasonable rates. . . .” 294 P.3d at 381-82. So too in South Carolina. While the constitutional language in Arizona is not identical to Art. IX, § 1, the substance of the Arizona provision is precisely the same as that which our



Supreme Court, as well as this Commission, has historically applied – the “fair value” of used and useful property, the test so clearly enunciated in Southern Bell.

In addition, as referenced above, pursuant to the BLRA, the utility may, and has in the case of SCE&G, received annual rate increases, without a hearing, to cover its additional costs. The ratepayer is given no real voice in these increases. Further, the Act binds everyone by the initial rate base order so that the prudence of the project may not be challenged further. And, the standard and commonly understood definition of “used and useful” is radically altered so as to date from the time of the initial base load review order, even though the construction has not even begun, much less been completed. Such regulation is in the utility’s and its shareholders’ interest, not the “public interest” as required by Article IX, § 1 of the South Carolina Constitution. We believe that such rate regulation violates Art. IX, § 1, as applied to SCE&G’s ratepayers. While SCE&G incorrectly characterizes the BLRA as constitutional in all aspects, it is the position of the Attorney General that such legislation is not in the “public interest.”

**Adoption of Article IX, § 1 in 1971 and  
Its Application By The Commission**

As we pointed out in our September 26, 2017 opinion, Art. IX § 1 of the South Carolina Constitution was adopted by the voters in 1970. Art. IX, § 1 states that:

[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.

(emphasis added). We advised in our September 26<sup>th</sup> opinion that:

[a] “blue ribbon panel, the West Committee,” chosen to make a study of the South Carolina Constitution of 1895, formulated the language of this provision. The provision was modelled upon the Kentucky constitution, but it is important to note that the Committee itself insisted on adding the language “to the extent required by the public interest.” There is no question that this language was intended by the Committee to be a limitation upon the power of the General Assembly. See West Committee

Minutes, II, 287 [“It (is not) bad constitutional policy to say that the Constitution is concerned that utilities [are] properly regulated for the public interest.”]. (emphasis added). Our Supreme Court typically affords considerable weight to the West Committee in interpreting the State Constitution. See e.g. Duncan v. York Co., 267 S.C. 327, 339, 228 S.E.2d 92, 97 (1976).

(emphasis added). Thus, pursuant to this provision of the State Constitution, the General Assembly must regulate utilities only in the “public interest.” While the Legislature undoubtedly possesses considerable latitude to determine what the “public interest” is in a given instance, such authority is subject to judicial review. As the Court stated in Sullivan v. DeCerb, 23 So.2d 571, 572 (Fla. 1945), the “declarations, regulations, findings and the entire Act of the Legislature are at all times subject to judicial review.” Moreover, as was observed in City of Pittsburgh v. Pa. Pub. Util. Comm., 69 A.2d 844, 849 (Pa. 1949),

[t]he property of a public utility is still private property, but it is devoted to the public service and impressed with a public interest. United Railways Elec. Co. of Balt. v. West, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390. A public utility occupies a quasi public or quasi trustee position; and the rates to be paid by the public for the service rendered, which are intended to produce a fair return on the fair value of used and useful property of a utility, must bear a relationship to the obligations which flow from such public status.

Most assuredly, the rates required by the BLRA, which have been imposed upon SCE&G ratepayers, fail this test.

Following adoption of Art. IX, § 1 in 1971, the General Assembly subsequently enacted Act 440 of 1980. Section 1 of that Act, delegated full authority to the Public Service Commission in the implementation of Art. IX, § 1. Section 1 of Act 440 states as follows:

[t]he General Assembly finds that the PSC (Commission) was created by the General Assembly to regulate common carriers and utilities serving the public as, and to the extent required by the public interest. The regulation of such carriers and utilities is one of the Commission’s most important functions and one that fundamentally affects the daily lives of citizens of this State. . . .

(emphasis added). This provision was enacted originally as part of an Act allowing the PSC to cite persons for contempt and the large portion of the Act is codified as part of § 58-3-225 of the Code. While Section 1, referenced above, delegating to the Commission the power to regulate utilities “to the extent, required by the public interest,” was not codified, it is part of the law. See Op. S.C. Atty. Gen., 1988 WL 485361 (December 22, 1988) [uncodified portion of Home Rule Act should be followed, nevertheless]. It will be noted that the exact same limitations contained in Art. IX, § 1, requiring the General Assembly to regulate utilities only in the “public interest,” is statutorily bestowed upon the PSC. The BLRA certainly did not repeal this provision relating to the duty of the Commission to regulate utilities in the “public interest.” Section 1 of Act 440 of 1980 makes it clear that the Commission must put the “citizens” of South Carolina first in its ratemaking. Thus, the Commission must consider the application of the BLRA in the context of Section 1 of Act 440 of 1980, as well, of course, as in the context of Art. IX, § 1. When the BLRA is evaluated in light of the need for the Legislature and the Commission to act only in the “public interest,” it is evident that the BLRA is not consistent in its application with either Art. IX, § 1 of the Constitution or with Section 1 of Act 440 of 1980.

It should be remembered also that the Public Service Commission correctly views Art. IX, § 1 as providing it with a constitutionally-based authority to protect the “public interest” in rate proceedings. In its decision, Re Carolina Water Serv. Inc., *supra*, the Commission quoted Art. IX, § 1, and explained, as follows:

[t]herefore, all regulation of public utilities must be conducted in a manner consistent with the public interest. The State Supreme Court has recognized this provision (Art. IX, § 1) as the underlying basis of the PSC’s authority to regulate public utilities. Duke Power Co. v. S.C. Pub. Serv. Comm., 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). The Commission’s determination of whether a proposed rate increase is just and reasonable is consistent with this mandate.

(emphasis added). Thus, the Commission has read the “public interest” requirement of Art. IX, § 1 in the context of rate increases as mandating only “just and reasonable” rates. In its Re Carolina Water Service decision, the Commission rejected any argument that the PSC does not make its own determination of what constitutes the “public interest.” According to the Commission, “[u]tility rates must be consistent with the public interest to be deemed just and reasonable and vice versa.” Moreover, notwithstanding the statutory provisions of the APA, the PSC concluded that it possesses the right, consistent with its duty to protect “public interest,” to reject a settlement. In the view of the Commission, the PSC alone must “determine the justness and reasonableness of the proposed settlement.” We agree.

#### **Judicial Construction of “Public Interest” Generally**

Accordingly, the PSC “has a general responsibility to protect the public interest regarding utility rates and practices. In fulfilling that function . . . , the [PSC] . . . has broadly based authority to do whatever it deems necessary to accomplish the legislative functions delegated to it.” City of Boulder v. Col. Pub. Utilities Comm., 996 P.2d 1270, 1277 (Colo. 2000) (quoting City of Montrose v. PUC, 629 P.2d 619, 624 (Colo. 1981). See also Utilities Services, 392 S.C. at 106, 708 S.E.2d at 760 [“The PSC may determine – independent of any party – that an expenditure is suspect and requires further scrutiny.”]; Anchor Point v. Shoals Sewer Co., 308 S.C. 422, 429, 418 S.E.2d 546, 550 (1992) [“. . . The PSC under the State’s police powers may establish rates for Shoals Sewer which would alter the master deed.”]; GTE Sprint Communications Corp. v. PSC of South Carolina, 288 S.C. 174, 182, 341 S.E.2d 126, 130 (1986) [“PSC’s action was based on the need to preserve affordable local telephone service and to protect the public interest.”]. Therefore, our Supreme Court, as well as other courts, have repeatedly held that the Commission must act to safeguard the “public interest” above all else.

With respect to the regulation of utilities, courts have addressed the question of what constitutes a “public interest.” As one commentator has explained, even though in the past the focus was primarily upon the protection of a utility’s investors, now, increasingly, emphasis is upon the consumers’ interest as a principal part of the “public interest.” Drobak, “From Turnpike To Nuclear Power: The Constitutional Limits of Utility Rate Regulation,” 65 B.U.L. Rev. 65, 67 (1985). And, as was stated in one United States Supreme Court case, “[t]he rights of the public cannot be ignored.” Covington and Lexington Turnpike Co. v. Sandford, 164 U.S. at 596. In Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 354-55 (1956), the Supreme Court also said this:

But while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Arkansas Railroad Comm., 261 U.S. 379, 43 S.Ct. 387, 67 L.Ed. 705. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest – as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed is “necessary in the public interest”. When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either “unjust” or “unreasonable” simply because it is unprofitable to the public utility.

(emphasis added). Thus, the Supreme Court in Sierra made it clear that “public interest” must be distinguished from the private interest of the utility or the utility’s profitability. Casting an “excessive burden” upon consumers by no means is in the “public interest”, according to Sierra. Yet, that is what the BLRA has done – cast an “excessive burden” upon consumers.

Further, as one court has recognized, “[a]bsent procedural or methodological flaws, the court may only set aside a rate that is outside a zone of reasonableness, bounded on one end by investor interest and the other by the public interest against excessive rates.” Pac. Gas & Elec. Co. v. FERC, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (emphasis added). Another court has explained that

[t]he purpose of public utility regulation is not only to secure a service for the community while seeking to obtain that service at a just and reasonable price, see Federal Power Commission v. Sunray DX Oil Co., 391 U.S. 9, 16 . . . (1968), but also to insure the “financial integrity” of the public utility. In re Permian Basin Area Rate Cases, 390 U.S. 747, 791-93 . . . (1968); Data Transmission Co. v. Corporation Commission, 561 P.2d 50, 54-55 (Ok. 1976). The Corporation Commission has a basic mandate under the Oklahoma Constitution to protect consumers from excessive rates and charges, and its objective is to achieve the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest. . . .

Sabine v. ONGW, Inc., 725 F.Supp. 1157, 1180-81 (W.D. Okla. 1989). Thus, achieving a proper balance, so as to protect consumers, is essential to a fair rate. As the PSC itself has noted, the public interest requirement is met when a rate “balances the interests of the Company and its customers and fulfills the obligation of the Commission to set just and reasonable rates.” In re United Util. Companies, Inc., 2004 WL 1637674 (March 19, 2004). See also El Paso Elec. Co. v. Pub. Util. Comm’n of Texas, 917 S.W.2d 846, 855-56 (Tex. App. 1995) [“As part of this balance, a utility is entitled to have the prudently incurred costs of ‘used and useful’ property included in its rate base when providing service to customers in its service area.”]; Hamm v. South Carolina Pub. Serv. Comm., 309 S.C. 295, 302-03, 422 S.E.2d 118, 122 (1992) [“We find that the PSC properly attempted to balance the interests of Wild Dunes in earning a return on its investment with the interests of Wild Dunes’ ratepayers in receiving adequate service at a fair and reasonable price.”].

**Importance of “Used and Useful” Test In  
Balancing Utility and Ratepayer Interests**

As this Commission well knows, the “used and useful” principle has always been an essential part of this balancing process in order to provide for rate regulation “in the public interest.” The Bluefield decision itself refers to the “property which [the utility] . . . employs for the convenience of the public.” Southern Bell cites the language of Bluefield with approval. Moreover, Justice Stukes recognized the importance of “used and useful” in Darby v. Southern Ry. Co., 194 S.C. 421, 10 S.E.2d 465, 475 (1940), noting that “[t]he power and propriety of the regulation in the public interest of railroads and other public utilities is grounded upon the public nature of the service and the public use to which property is dedicated.” (citing 51 C.J. 9) (Stukes, J. dissenting) (emphasis added).

Furthermore, as one authority has written, “[t]he historic distinction between what is and what is not employed or devoted to a public use, in other words what is ‘clothed with a public interest’ so as to warrant [utility regulation by the State] . . . [is whether utility property] is used and useful to the public service.” Hoecker, “‘Used and Useful’: Autopsy of Rate Making Policy,” 8 Energy L.J. at 305 (1987). See Columbus Gas & Fuel Co. v. Pub. Util. Comm., 292 U.S. 398, 406-07 (1934) [“To capitalize (property) . . . sooner (than when used and useful) is to build the rate structure of the business upon assets held in idleness to abide the uses of the property.”]. See also Citizens For Fair Utility Rates v. Pub. Util. Comm. of Texas, 924 S.W.2d 933, 935 (Tex. 1995) [“. . . the cost of constructing a new facility . . . is an asset to be used in the future. As such, it must be included in a utility’s rate base, but not until the facility has become ‘used and useful’ in rendering service to the public.”] (emphasis added); Lone Star Gas Co. v. State, 153 S.W.2d 681, 698 (1941) [used and useful refers to “such property as has been acquired

in good faith and held for use in the reasonably near future in order to enable [a utility] to supply and furnish adequate and uninterrupted . . . service.”].

In Pa. Elec. Co. v. Pa. Pub. Util. Comm., 502 A.2d 130, 134-35 (Pa. 1985), the Pennsylvania Supreme Court noted that “[t]he ‘used and useful’ concept came into existence long before the Hope decision was rendered, and it is not generally regarded as having been overridden by that decision.” The Pennsylvania Court went on to say that consumers are protected by the “used and useful” rule and that Hope “is to be interpreted as recognizing a constitutional requirement of ‘just and reasonable’ utility rates, providing a return on used and useful property, with rates to be determined through a balancing of consumer and investor interests.”

And, as the United States Supreme Court long ago explained in Munn v. Illinois, 94 U.S. 113, 126 (1876),

[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. . . .

Thus, both our Supreme Court, as well as this Commission, have long employed the “used and useful” test with respect to the regulation of utility rates, and has recognized that such a test well serves the “public interest.”

In short, the “used and useful” test protects ratepayers and greatly assists in the “balancing” process, constitutionally required to achieve a just and reasonable rate. Jersey Central, 810 F.2d at 1190 (Starr, J. concurring) [“used and useful” rule is a safeguard for “striking a reasonable balance in rate setting....”] As one court has stated, “in order to function



in the public interest, the rates of a utility must be such as to cover legitimate operating expenses, and at the same time not result in an excessive return upon the fair value of the property devoted to the public use. ” Orlosky v. Pennsylvania Pub. Util. Comm’n, 89 A.2d 903, 906 (Pa. 1952). Moreover, as another court has noted, the utility regulator is “not [an] advocate [ ] of anything other than fair regulation of utility rates.” It is the duty of the Commission to “maintain the requisite equilibrium between the public and private interests involved. A balance must be struck which will attempt to insure that substantial justice is done.” Com. Pub. Utility Comm. v. Laurel Pipe Line Co., 370 A.2d 1252, 1254 (Pa. 1977). However, the BLRA tosses this “balance” overboard. The Act does not allow this Commission to strike that “balance” or to do “justice” to the ratepayers, because it abandons traditional ratemaking principles completely. Further, as noted above, this Commission, in In re Carolina Water Service, *supra*, has stated that utility rates must “be consistent with the public interest and vice versa.” In Georgia Power Co. v. Georgia Pub. Serv. Comm., 201 S.E.2d 423, 425 (Ga. 1973), the Georgia Supreme Court likewise explained:

[t]he rate making process for a regulated utility, so as to produce just and reasonable rates for the utility, just and reasonable rates for present customers of the utility, just and reasonable rates for future customers of the utility, and rates that are just and reasonable in the entire public interest, is not an exact science. Yet, after a rate hearing, the Commission is called upon to come forth with just such ‘just and reasonable’ rates.

**The Historical Meaning of “Public Interest” In Article IX, § 1  
Confirms “Fair Value” on “Used and Useful” Property**

Having discussed “public interest” generally, we now explore Art. IX, § 1 itself. No such “just and reasonable” rates are produced by application of the BLRA to SCE&G. As to precisely what the framers of Art. IX, § 1 themselves meant by requiring that the General Assembly must regulate utilities in the “public interest,” we believe the best guide is to examine

the history of the times and the practices prior to the provision's adoption. As noted above, the West Committee insisted upon the insertion of the phrase "public interest" in the text of the constitutional provision. By doing so, it is clear that the framers did not intend to give the Legislature a "blank check" with respect to rate regulation, as SCE&G argues, but instead to impose as a matter of South Carolina constitutional law, the requirement of achieving a just and reasonable rate through the "fair value" of "used and useful" property. The Commission itself has recognized the limitation imposed by Art. IX, § 1 by noting that ". . . all regulation of public utilities must be conducted in a manner consistent with the public interest." Re Carolina Water Service, supra.

Our Supreme Court has held that, where no "categorical answer is to be found in the express language" of the constitutional provision as to the definition of the words used, that "in seeking to ascertain its meaning, [we] look to its historical background." Knight v. Hollings, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963). The Knight Court further elaborated:

[f]or while a constitutional provision of doubtful import is not to be viewed solely in the light of conditions existing at the time of its adoption, being intended not to obstruct the progress of the State but rather to meet and be applied to new conditions and circumstances as they may arise, consideration of the history of the times in which it was framed and adopted, and of the object sought to be accomplished by it, is an appropriate inquiry in the judicial effort to determine the intent of its framers and the people who adopted it.

In interpreting words used in a constitutional amendment, the Court has also observed that

. . . We are not required to confine our attention to the abstract, technical meaning to the word or words employed, but must look to their ordinary and popular meaning also. The object being to ascertain the intention of the framers of the Constitution, which must be gathered from the words used, we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the Constitution unless there is something in that instrument showing that the words in question were used in a different sense.

City of Charleston v. Oliver, 16 S.C. 47, 52 (1881). Moreover, in Reese v. Talbert, 237 S.C. 356, 358, 117 S.E.2d 375, 376 (1960), the Court concluded that a constitutional amendment's meaning may be ascertained by "the history of the times in which the amendment was framed, the object sought to be accomplished and legislative interpretation of its provisions."

The Court also examines past practices before and after the amendment's adoption to determine its meaning. Heinisch v. Floyd, 130 S.C. 434, 126 S.E. 336 (1925). See also McKeown v. Carroll, 5 S.C. 75 (1875) ["This view is strengthened by the fact that such was the contemporary interpretation."]; Williams, v. Morris, 320 S.C. 196, 204, 464 S.E. 97, 102 (1995) ["courts should accord weight to past practices and legislative interpretation."].

State v. Thrift, 312 S.C. 282, 440 S.E.2d 344 (1994) is particularly instructive in this regard. In Thrift, the question was whether "use immunity" was consistent with the State Constitution's provision protecting against self incrimination (Art. I, § 12). The Court, in reaching the conclusion that such immunity was not authorized under the State Constitution, cited Ex Parte Johnson, 187 S.C. 1, 196 S.E. 164 (1938). The Court in Thrift also held that the federal Constitution's interpretation permitting use immunity was not binding upon any interpretation of the South Carolina Constitution. Instead, the Court examined South Carolina's history, particularly Ex Parte Johnson, where the Court had construed Art. I, § 12 broadly in favor of the person testifying before a legislative committee. Thus, in Thrift, "anything less than transactional immunity was unconstitutional under Article I, Section 12 or the South Carolina Constitution." Thrift, 312 S.C. at 298, 440 S.E.2d at 359. Accordingly, based upon the history and prior interpretations of Art. I, § 12, there was an irreconcilable conflict between the State Constitution "and the new 'use immunity' statute in the State Grand Jury Act. . . . Article I, § 12

permits only transactional immunity and as such can only be amended by the citizens of South Carolina be referendum.” 312 S.C. at 300, 440 S.E.2d at 351.

Again, in State ex rel. McLeod v. Snipes, 266 S.C. 415, 419, 223 S.E.2d 853, 854 (1976), the Court looked to past statutes and practices in interpreting Art. V, § 20, relating to the duties of the Attorney General as “chief prosecuting officer of the State”. The Court in Snipes explained:

[b]y way of background, Section 1-234 was enacted in 1960 and Article V, Section 20, was ratified in 1973. While this constitutional provision designated the Attorney General as the chief prosecuting officer for the first time, it represented no practical change in the situation of the Attorney General from that which existed prior to the adoption of this provisions of the Constitution in 1973. For, prior to 1973, Code Section 1-237, enacted in 1868, provided for the participation of the Attorney General in prosecutions. . . . It is apparent, therefore, that the present situation was not created by the adoption of Article V, Section 20, in 1973; but rather the constitutional designation of the Attorney General as the chief prosecuting officer for the first time brought the matter to public attention.

Likewise, in this case, it is clear that the adoption of Article IX, § 1 “represented no practical change” in the requirement that the General Assembly must regulate utility rates “in the public interest,” as that term was meant by the framers with respect to the regulation of rates in South Carolina. Long before the adoption of Article IX, § 1, the past practices in South Carolina had defined the regulation of utility rates “in the public interest” by the methodology of “fair return” upon the “used and useful” property. We are able to date this utility ratemaking approach at least back to the 1930’s. For example, in Coney v. Broad River Power Co., 171 S.C.377, 172 S.E. 437, 438 (1933), our Supreme Court stated:

[m]anifestly, in order to arrive at a fair return upon the fair value of the company’s property, there must be included in the inventory and the evaluation thereof all the properties of the company used or useful in its business of generating electricity and in its related business. This is the

basis upon which the Commission must fix the rates which it has commended the company to adopt and put into effect.

(emphasis added). And, in DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 333 (1934). The Court explained that a utility is

“admittedly entitled, the same as a conservative private business which is subject to similar risks and uncertainties, to a fair return on the value of its property used and useful in the service of its customers; and as is its duty, the rate-making body named by the Legislature for that purpose fixes such rates, upon a full consideration of all the relevant facts entering into its determination of the matter, as will insure such a return, but no more.”

(emphasis added). Use of this methodology can be dated back even further, as seen in Shealy v. Southern Ry. Co., 127 S.C. 15, 120 S.E. 561, 566 (1924) [railroad entitled to a “fair return upon the aggregate value of their railroad property of such carriers held for and used on the service of transportation.”]. Thus, historically, prior to the adoption of Art. IX, § 1, there can be no doubt that the “public interest” was defined with respect to ratemaking in South Carolina as “just and reasonable” rates determined upon the “fair value” of “used and useful” property. The Court in DePass made it clear prior to the adoption of Art. IX, § 1 that “no more” should be granted a utility (emphasis added). Ratemaking in the “public interest” in South Carolina meant a rate base only of “used and useful” property, and it meant application of the “original cost” methodology in accordance with “Bluefield-Hope.”

As noted above, this view of the “public interest” is not unique to South Carolina by any means. As was explained by the Mississippi Supreme Court in Miss. Power Co. v. Miss. Pub. Serv. Comm., *supra*, the “used and useful” methodology dated back to the nineteenth century:

[m]ost authorities regard the “used and useful” [test] . . . conceptually, as having derived from the United States Supreme Court’s decision in Smyth v. Ames, 169 U.S. 466, 546 (1898) in

[T]he basis of all calculations as to the reasonableness of rates to be charged by a [public utility] must be the fair value of the property being used by it for the convenience of the public. . . .

Id. at 546-47, 18 S.Ct. 418 (emphasis added). The concept, however, as also expressed in Munn v. Illinois, where the Supreme Court spoke to an English case Aldnutt v. Inglis, 12 East 527, decided in 1810, in which the question was presented whether the London Dock Company could charge arbitrary rates for storing imported wines after having obtained authority under the general warehousing act to engage in such services. Munn, 94 U.S. at 127. Munn noted, (quoting Lord Ellenborough):

[t]here is no doubt that the general principle is favored, both in law and justice that every man may fix what price he pleases upon his own property, or the use of it, but if for a particular purpose the public have a right to resort to his promises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf.

168 So.3d at 920 (quoting Aldnott v. Inglis) (Pierce, J., specially concurring). Thus, the “used and useful” property test, as well as the “reasonable” rates principle (based upon “fair value”), has a long and well-honored place, not only in South Carolina, but in the law generally. The Court of Appeals for the District of Columbia Circuit described the almost universal applicability of the rule and the reasons therefor, emphasizing also that the “prudent investment rule” was not to become the prevailing rule: “[t]he general rule recognized by this Court is that an expenditure for an item may be included in a public utility’s rate base only when the item is ‘used and useful’

in providing service.” NEPCO, Mun. Rate Comm. v. FERC, 668 F.2d 1327, 1333 (D.C. Cir. 1981). These time-honored principles were finally established in South Carolina when Art. IX, § 1 was adopted to expressly require regulation of rates “in the public interest.” But this had always been so. In short, this has continuously been the law in South Carolina – until the BLRA.

Importantly, following the adoption of Art. IX, § 1, the rate methodology in South Carolina remained precisely the same as it always had been. A few months after the ratification of Art. IX, § 1, this Commission stated in its order in the rate case of Re Southern Bell Telephone and Tel. Co., 1971 WL 266516 (Dec. 22, 1971), that it has always employed the “used and useful” test and was continuing that practice:

[f]or the purposes of this proceeding, the rate base for Southern Bell includes the company’s property, used and useful in intrastate service; an allowance for working capital; materials and supplies and determination telephone plant under construction. The rate base determinations are as follows:

This Commission has historically used what is commonly known as original cost-less depreciation in determining plant in service. The company used this method in arriving at the cost of the plant in service in the State of South Carolina.

(emphasis added). Four years later, in Re Lockhart Power Co., 1975 WL 410514 (January 10, 1975), the Commission again summarized its longstanding methodology:

[t]he rate base is made up of the value of the company’s property used and useful in the service of electricity; plus construction work in progress, material and supplies and working capital allowance; less reserve for depreciation and amortization, contributions in aid of construction, accumulated deferred income tax (liberalized depreciation) and customer deposits.

Thus, there can be no doubt that, both long before and continuously after the adoption of Art. IX, § 1, the “public interest” in ratemaking, as applied by the Supreme Court of South Carolina and this Commission, has been based upon the “fair value” of “used and useful” property.

As noted above, such a methodology is strongly confirmed in 1978, by the South Carolina Supreme Court. In Southern Bell Tel. and Tel. Co. v. Public Service Comm., the Court fully articulated the governing principles of rate regulation with respect to the due process clause, as follows:

[i]t is generally stated that “the governing principle for determining rates to be charged by a public utility is the right of the public on one hand to be served at a reasonable charge, and the right of the utility on the other to a fair return on the value of its property used in the service.” 64 Am. Jur.2d Public Utilities, 169.

The two leading cases from the United States Supreme Court setting forth the basic principles of utility rate regulation are Bluefield Water Works Improvement Co. v. Public Service Commission of West Virginia, 282 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923), and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

In Bluefield, the Court stated:

“What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting the opportunities for investment, the money market and business conditions generally.” 262 U.S. at 692-693, 43 S.Ct. at 679, 671 L.Ed. at 1182-1183.

In the Hope Natural Gas Company case, the United States Supreme Court stated:



“We held in Federal Power Commission v. Natural Gas Pipeline Co., . . . that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its ratemaking function, moreover, involves the making of ‘pragmatic adjustments’. . . . Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling. . . . The ratemaking process under the Act, i.e., the fixing of ‘just and reasonable’ rates involves the balancing of the investor and consumer interests. Thus, we stated in the Natural Gas Pipeline Co. case, that ‘regulation does not insure that the business shall produce net revenues.’ . . . . But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expense but also for the capital cost of the business. These include service on debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” 320 U.S. at 602-603, 64 S.Ct. at 287-288, 88 L.Ed. at 345.

(emphasis added). Again, it is this “Bluefield-Hope” analysis on “used and useful” property which this Commission has always applied. See e.g. In Re South Carolina Pipeline Corp., 1998 WL 3561772 (June 4, 1998) [“In determining the cost of equity capital, the Commission is guided by the standards of Hope and Bluefield.”]; In Re Application of Lockhart Power Co., 1983 WL 907036 (June 9, 1983) [Under the guidelines established in the decisions of Bluefield . . . and Hope, this Commission does not insure through regulation that a utility will produce net revenues.”]; In Re Application of Duke Energy Carolinas, 2013 WL 8721532 (September 18, 2013) [“In setting rates, the Commission must determine a fair rate of return that the utility should be allowed the opportunity to earn after recovery of the expenses of a utility operation. The legal standards applicable to this determination are set forth in [Hope and Bluefield]. . . . These standards were adopted by the South Carolina Supreme Court in [Southern Bell]. . . .].

Thus, the Southern Bell decision, decided after the adoption of Article IX, § 1, serves as the polestar for utility rate regulation in South Carolina. Moreover, Southern Bell effectively determines the meaning of “public interest” in Art. IX, § 1 contemporaneous with Art. IX, § 1’s adoption. Southern Bell incorporates not only the “used and useful” test for the rate base, but institutes the “Bluefield-Hope” test to require a “balancing” between investor and consumer interests to achieve a just and reasonable rate. For example, in Hamm v. S.C. Pub. Serv. Comm., 298 S.C. 309, 310, n. 1, 380 S.E.2d 428, 429, n. 1 (1989), the Court cited Southern Bell, stating that “[t]he ‘rate base’ is the amount of investment which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return. A public utility’s ‘rate base’ represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services. ” (quoting Southern Bell). Other South Carolina decisions are in accord. Parker v. S.C. PSC, 280 S.C. 310, 313 S.E.2d 229 (1984) (citing Southern Bell); Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff, supra (citing Southern Bell); Utilities Service of S.C. v. S.C. Office of Regulatory Staff, supra (citing Southern Bell and Bluefield, supra to the effect that a “regulated public utility is entitled to ‘an opportunity to earn a fair and reasonable return’ on its investments.”); Patton v. S.C. PSC, 280 S.C. 288, 312 S.E.2d 257 (1984) [citing Southern Bell, Hope and Bluefield]. While there have been a few exceptions to the “used and useful” principle, such as property for future use, or CWIP, the Court has remained steadfast that Bluefield-Hope represents the cornerstone of utility regulation in South Carolina. See also Mims v. Edgefield Co. Water and Sewer Auth., 278 S.C. at 556, 299 S.E.2d at 486 [“The focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory or so high as to be unduly burdensome to the utility’s customers.”]. Thus, we believe that the framers of Art. IX, § 1 incorporated those

principles into the definition of “public interest” as used therein. Any deviation therefrom, such as is contained in the BLRA, violates Art. IX, § 1. See Simms v. Round Valley Light & Power Co., supra, [Court concludes that prudent investment methodology violates Arizona Constitution requiring just and reasonable rates based upon “fair value” of property]. Accordingly, SCE&G is wrong when it argues that the “used and useful” is not constitutionally required. SCE&G Brief at 24. It is. “Used and Useful” is mandated by Article IX, § 1 of the South Carolina Constitution, as well as ensuring that the constitutional balance between investor and ratepayer is achieved under Hope Natural Gas.

However, Section 58-33-275(A) of the BLRA dramatically redefines the long understood definition of “used and useful.” Such provision states that “[a] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of the approved construction schedule and the approved cost estimates.” Of course, such is markedly different from the standard definition of “used and useful,” discussed above. As was stated in Smyth v. Ames, supra, “the basis of all calculations as to the reasonableness of rates to be charged . . . must be the fair value being used by it for the convenience of the public.” And, in Denver Union Stock Yard Co. v. U.S., 304 U.S. 470, 475 (1938), the Court elaborated upon Smyth, noting that pursuant to the Due Process Clause, a utility is

. . . entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of the property used, at the time it is being used, to render the services. . . . But it is not entitled to have included any property not used and useful for that purpose.

(emphasis added). Thus, as we have documented, it is virtually a universal rule of utility regulation that “ratepayer consumers should only pay the utility company a fair return on

facilities and capital outlay actually used and useable for production of services to these ratepayers.” Gulf States Utilities Co. v. Louisiana PSC, 364 So.2d 1266, 1269 (La. 1978). And, as noted above, our Supreme Court has always recognized the “used and useful” principle as stated in Southern Bell, *supra* [rate base “represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to the regulated services.”]. Yet, in the one instance involving the BLRA, in the haste to build a nuclear facility, this “used and useful” rule was discarded. See § 58-33-275(A) [re-defining “used and useful”].

While it is generally true that the Legislature has broad power to define statutory terms, or make definitions, such power is not unlimited. As was said in State ex rel. Stanberg v. Omaha Exposition Racing, Inc., 644 N.W.2d 563, 570 (Neb. 2002), the Legislature’s “power to define [terms] is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded.” (quoting MAPCO Ammonia Pipeline v. State Bd. Of Equal, 471 N.C.J.2d 734, 739 (Neb. 1991). As another court has observed,

[i]t is true that legislatures may define the terms used in their enactments and that courts are bound to accept their definitions. . . . [cases cited]. This rule extends only to the meaning to be given by the courts, in construing a statute to the terms defined. It does not prevent a court, when the constitutionality of the statute is attacked, from examining a definition to see whether it logically and fairly describes what it purports to define. To take an extreme case, it is questionable whether a legislature could, by defining a dog having the components of a horse, subject the owner of a horse to the dog licensing statute.

United Interchange v. Spellacy, 138 A.2d 801, 805 (Conn. 1957). Moreover, it is well recognized by the leading authority on statutory interpretation that “[c]ourts may not be bound by statutory definitions where they are arbitrary and result in unreasonable classifications. . . .”

Sizer, 2A Sutherland, Statutory Construction § 47:7 (7<sup>th</sup> ed.). We believe the BLRA's definition of "used and useful" is arbitrary and unreasonable.

Further, it is well settled that "the legislature cannot make certain facts conclusive proof of another ultimate fact when there is not logical connection in experience to connect them." City of New York Richey v. Fidelity and Deposit Co. of Md., 105 F.2d 348, 351 (5<sup>th</sup> Cir. 1939). As was concluded in Fitzhugh v. City of Jackson, 97 So. 190, 193 (Miss. 1923) (citing Quintani v. City of Bay St. Louis, 1 So. 625), the legislature cannot

. . . by a mere declaration, convert the harmless, proper and ordinary use of property into a nuisance. Where the use of the land furnishes the test for the determination of the constitutionality of the law, the legislature may not conclusively determine the effect to be harmful. This would be the assumption of judicial functions by the legislative department.

Similarly, pursuant to § 58-33-275(A), the General Assembly has here conclusively declared the plants to be "used and useful" based upon the base load review order. Such a declaration has "no logical connection or probability on experience to connect them." City of New York, supra. This issue is more fully elaborated upon at pp. 25-27 of the September 26, 2017 Opinion.

Based upon these well recognized authorities, application of the definition "used and useful" in § 58-33-275(A) is contrary to longstanding South Carolina law, and is not in the "public interest" as required by Art. IX, 1. Such application is one which strongly favors the interest of the utility, because it allows the utility to continuously collect the costs of financing a project which need not even be deemed "used and useful" to ratepayers.

**BLRA Does Not Ensure "Public Interest"**  
**Under Article IX § 1**

This Commission itself has also recognized that the principle of "used and useful" in its usual meaning serves the public interest. As the PSC stated in Re: South Carolina Electric and Gas Co., et al., 1987 WL 257838 (87-682) (July 1, 1987), "[t]he traditional test of used and

useful coupled with the test of prudence of investment have served the public interest of South Carolina well, and is historically the test applied by the Commission in the discharge of its ratemaking responsibilities.” We agree.

The Commission has also concluded that a system of rate regulation, such as is provided in the BLRA (with its redefining of “used and useful”), does not serve the public interest. In its order in Re Madera Utilities, 2004 WL 1714912 (2004-296) (June 15, 2004), the Commission explained how a system of awarding capital costs to a utility before such a project becomes “used and useful” is both bad public policy and not in accord with South Carolina law:

[w]hat Madera is requesting this Commission to do is require the customers of Madera to fund up-front the improvements which Madera wants to make to the system. However, Madera must recognize that it is a public utility and that it has an obligation to provide the services to that portion of the public in Madera’s authorized service territory. Traditionally, a utility will make improvements, capital expenditures, or investment in plant through funding provided by shareholders. Once the improvements, capital expenditures, or investment in plant have been completed and the plant is used in providing the utility services to the public, a utility will seek a return on the investment made by a utility or shareholders. To have a return set and to seek to recover appropriate amounts of the investment, the utility will file a rate case and ask that rates be set using the improvements, capital expenditures, or investment in plant. However, under the traditional scenario, the utility seeks rate coverage after the capital expenditures have been made and after the improvements or investment in plant are used in providing service. At that point, a utility can state with specificity and certainly the amounts spent on the improvements or the investment in plant are used in providing service. At that point, a utility can state with specificity and certainty the amounts spent on the improvements or the investment in plant and thus meet the known and measurable principle and can state that the improvements are used in providing service to the public and meets the ‘used and useful’ principle.

However, the BLRA imposes the very harms which Madera emphasized that South Carolina law protects against. The Act – radically redefining “used and useful” – allows the utility to recover costs “up front” rather than after the plants are actually serving customers. The

BLRA seeks to implement a form of the ‘prudent investment’ theory, first articulated by Justice Brandeis in his dissenting opinion in State of Missouri ex rel. Southwestern Bell v. Pub. Serv. Comm., supra, and which is based upon “the amount of capital prudently invested.” Dem. Cent. Comm. of Dist. of Columbia v. Wash. Metropolitan Area Transit Comm., supra. However, as the Court in Democratic Central emphasized, the prudent investment theory “was not to become the prevailing rule.” As explained and documented above, such a theory is certainly not the “prevailing rule” in South Carolina and thus the BLRA is in contravention of the “public interest” requirement of Art. IX, § 1. Madera points out in detail how ratemaking in South Carolina achieves a just and reasonable rate, which is one “in the public interest.” Madera also concludes that paying a utility “up front” prior to its property being “used and useful” is not in the “public interest.”

#### **Jersey Central Power Case**

The decision in Jersey Cent. Power and Light Co. v. FERC, supra, further illustrates the serious flaws in the prudent investment rule and clearly demonstrates why that rule is not in the “public interest.” Judge Ken Starr’s concurring opinion in Jersey Central is particularly illustrative of these flaws. In his opinion, Judge Starr recognized that the “used and useful” principle is essential to the protection of ratepayers in any rate case. Just as this Commission so concluded in Madera, Judge Starr noted that both the requirement of prudence and the rule of “used and useful” work hand-in-hand to allow the establishment of a “just and reasonable” rate. In the words of Judge Starr,

[r]equiring an investment to be prudent when made is one safeguard imposed by regulatory authorities upon the regulated business for benefit of ratepayers. As I see it, the “used and useful” rule is but another safeguard. The prudence rule looks to the time of investment, whereas the “used and useful” rule looks toward a later time. The two principles are designed to assure that the ratepayer, whose property might otherwise of

course be “taken” by regulatory authorities, will not necessarily be saddled with the results of management’s defalcations or mistakes, or as a matter of simple justice, be required to pay for that which provides the ratepayers with no discernible benefit.

810 F.2d at 1190 (Starr, J., concurring) (emphasis added).

Judge Starr prophetically envisioned in 1987 precisely how the BLRA has harmed ratepayers in South Carolina since 2009. In his view, the “two principles [of prudence and ‘used and useful’] . . . provide assurances that ill-guided management or management that simply proves in hindsight to have been wrong will not automatically be bailed out from conditions which government did not force upon it.” *Id.* He observed that “[u]tilities are not exempt from comparable forces. . . .” As the cases have repeatedly held, “the Fifth Amendment does not provide utility investors with a haven from operation of market forces. . . . Yet, the prudent investment rule, in full vigor, would accomplish virtually that state of insulation.” Judge Starr continued:

[f]or me, the prudent investment rule is, taken alone, too weighted for constitutional analysis in favor of the utility. It lacks balance. But so too, the “used and useful” rule, taken alone, is skewed heavily in favor of ratepayers. It also lacks balance. In the modern setting, neither regime, mechanically applied with full rigor, will likely achieve justice among the competing interests of investor and ratepayers so as to avoid confiscation of the utility’s property or a taking of the property of ratepayers through unjustifiably exorbitant rates. Each approach, however, provide important insights about the ultimate object of the regulatory process, which is to achieve a just result in rate regulation. And that is the mission commanded by the Fifth Amendment. Unlike garden variety takings, the requirements of the Takings Clause are satisfied in the rate regulator, setting when justice is done, that is to say the striking of a reasonable balance between competing interests.

*Id.* at 1191. Judge Starr’s analysis is dead on. The BLRA seeks to provide SCE&G a haven or shelter from the forces of the free market. However, ratepayers are not a safety net for SCE&G’s



investors. The BLRA gives SCE&G this safety net, making application of the statute contrary to the “public interest.”

The other opinions in Jersey Central Power equally demonstrate the concerns created by the prudent investment rule found in the BLRA. Judge Bork’s majority opinion in Jersey Central quoted Permian Basin Rate Cases, 390 U.S. 747, 792 (1968), noting that a rate order must

. . . maintain financial integrity, attract necessary capital, and fairly compensate investors for the risk they have assumed, and yet provide appropriate protections to the relevant public interests, both existing and foreseeable.

810 F.2d at 1177 (emphasis added). The rate order, taken as a whole, cannot “produce arbitrary or unreasonable consequences.” Id., quoting Permian Basin at 390 U.S. at 800. In the end, as Judge Bork noted, a rate order must “add up to a reasonable result.” 810 F.2d at 1178. He observed that Hope Natural Gas’s interpretation of the federal Constitution makes it clear that “[i]n addition to prohibiting rates so low as to be confiscatory, . . . exploitative rates are illegal as well.” 810 F.2d at 1180 (emphasis added). He further stated that, while the prudent investment theory of a rate base did not “automatically constitute [ ] exploitation of consumers,” particularly with respect to a company in financial distress, it is also clear that

[a] regulated utility has no constitutional right to a profit, see FPC v. Natural Gas Pipeline Co., 315 U.S. at 590, 62 S.Ct. at 745, and a company that is unable to survive without charging exploitative rates has not entitlement to such rates. Market Street Ry. v. Railway Comm. of Cal., 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 (1945).

810 F.2d at 1181. In this instance, as Judge Bork indicated, there is no basis for application of the “prudent investment” methodology to SCE&G. At the time the BLRA went into effect, and SCE&G began reaping the benefits of the Act, and continuing even today it certainly could not be said that SCE&G is a “company in financial distress.” Moreover, even if the only means by which SCE&G could attract investors to the project was to “exploit” SCE&G ratepayers, as has

turned out to be the case, certainly, the project was on shaky ground to begin with. Thus, SCE&G's arguments that it was necessary to adopt the BLRA in order to attract investors are completely misplaced. Finding investors willing to invest in a project such as this cannot justify exploiting ratepayers and exploiting ratepayers is not in the "public interest," as Art. IX, § 1 requires.

Writing for the majority, Judge Bork was of the view, based upon the absence of a record, that "it is impossible for us to say at this juncture whether including the unamortized portion of Forked River would exploit consumers in this case, or whether its exclusion, on the facts of this case, constitute confiscation, for no findings of fact have been made concerning the consequences of the rate order." *Id.* (emphasis in original). Thus, Judge Bork's opinion for the majority ordered a remand to FERC "for a hearing at which the Commission can determine whether the rate order it issued constituted a reasonable balancing of the interests the Supreme Court has designated as relevant to the setting of a just and reasonable rate." *Id.* at 1182. In other words, Judge Bork was of the view that, depending upon the facts, as determined by FERC, the setting of a rate which utilized prudent investments, as opposed to one which allowed only used and useful property in the rate base, could be exploitative of consumers, and thus violate the federal Constitution as a "taking." Thus, Bork saw the issue as one of whether the methodology was unconstitutional as applied. This Commission must make that determination here. We believe that the BLRA is indeed exploitative of SCE&G ratepayers and is contrary to the "public interest" in violation of Art. IX, § 1.

The dissenting opinion in Jersey Central Power viewed any modification of "used and useful" in favor of prudent investments automatically to be exploitative of consumers. Judge Mikva, writing for the dissent, explained that the "prudent investment" point of view

. . . would prefer a world in which the investor is guaranteed a return on his investment if prudent when made. . . . Adherence to the majority's insistence on the inclusion of prudent investments in the rate base would virtually insulate investors in public utilities from the risks involved in free market businesses. . . . This would drastically diminish protection of the public interest by thrusting the entire risk of a failed investment onto the ratepayers.

. . . .[Such a view] would convert utility stockholders from risk takers into annuity holders. . . . Neither Hope nor the fifth amendment takings clause sanctions such radical results. Cf. Hope, 320 U.S. at 603, 64 S.Ct. at 288 (stating that the "return to the equity owner should be commensurate with returns on investments in other investments having corresponding risks.

810 F.2d at 1212 (Mikva, J. dissenting) (emphasis added). Here, the BLRA removes any real challenge to "prudence." As Justice Hearn aptly noted, the BLRA leaves no "mechanism in place [for ratepayers] to challenge the prudence of SCE&G's financial decisions." Energy Users Comm. v. SCE&G, supra. Thus, the BLRA imposes a "prudent investment" theory upon ratepayers, uprooting longstanding South Carolina law, without giving ratepayers any mechanism to challenge the prudence of the utility's investments. By "thrusting the entire risk of a failed investment onto ratepayers," the BLRA ratemaking process is not in "the public interest" as required by Art. IX, § 1.

### **Other Critics of The Prudent Investment Rule**

The Attorney General is, by no means, the only one to argue that the prudent investment theory of ratemaking is not in the public interest. In the Duquesne Light case, the National Governors Association, et al., filed an amicus brief to the United States Supreme Court, stating in part that any mandate of a prudent investment standard "as the sole determinant of recovery . . . is particularly flawed." According to the Governors' Association Brief, prudent investment

[m]ay be the least economically defensible of all regulatory approaches. It would "increase consumers' bills dramatically, without producing any tangible benefit for consumers" and would "produce results strikingly different from the results of erroneous investment decisions made by firms

in unregulated markets.” . . . . It provides an incentive to overinvest in capital assets. . . . . A regulatory process based solely on prudence would be expensive, intrusive, unpredictable and probably futile, in part because a finding of prudent investment may reflect no more than the extraordinary difficulty of proving imprudence. Nor is recovery of prudent investment in assets that are not used in useful necessary to enable the utility to attract capital or to protect the long term interests of existing stockholders.

The Governors’ Association Brief went on to say that

[t]he market in utility stocks and bonds is self-correcting. If application of the used and useful standard operates to increase the risk of disallowance, “[t]heoretically, in subsequent rate cases, the higher risk will manifest itself in a higher rate of return allowance being granted to the utility to ‘compensate’ for the additional risk.” *New England Power Co.*, 42 FERC (CCH) ¶ 61, 016, 080 (Jan. 15, 1988). Cf. *Jersey Central*, 810 F.2d at 1172 (higher rate of return requested in view of disallowance from the rate base).

Brief of Nat. Governors Assn., et al. in *Duquesne Light Co. v. Barasch*, No. 87-1160, 1988 WL 1025607 (October Term, 1988), at 19 and n. 32. This is exactly what has happened here: the BLRA has increased “consumer bills dramatically without producing any tangible benefit for consumers.”

In that same Duquesne case, the National Association of Regulatory Commissioners also filed an amicus brief, opposing any abandonment of Hope Natural Gas, and any constitutionalization of the prudent investment rule. The Regulatory Commissioners’ Brief noted:

[h]owever, the “used and useful” test serves important regulatory purposes – and not the “generalized . . . consumer interest in having lower and more affordable rates . . . which would be lost should the Court abandon the Hope standard in favor of a ‘prudent investment’ methodology.” The test [used and useful] provides regulatory commissions with the power to allocate the inherent risks of the utility business between utility shareholders – who assume investment risks when they purchase stock – and ratepayers who seek nothing but affordable and reliable service. *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1190, n. 1 (Starr, J. concurring) (“The ‘used and useful’ rule operates as a restraining

principle, reminding utility management that they must assume the risk of economic forces working against which is prudent at the time it is made.”).

Adoption of the prudent investment test as the “constitutional benchmark” for utility ratemaking would effectively foreclose the ability of regulators to allocate the risks of plant failure between shareholders and ratepayers. As Judge Starr ably described in Jersey Central, *supra*, the prudent investment rule shifts the risk of construction – including the risk of bad management - to ratepayers thereby effectively insulating the utility and its investors from the vicissitudes of the market. 810 F.2d at 1190-91. Moreover, the test proposed by amici would require that ratepayers pay for investments providing them “no discernible benefit.” *Id.*

In fact, beyond the issue of risk allocation, the “used and useful” test serves the entirely appropriate and important public purpose of ensuring that ratepayers not support financially utility investments having nothing to do with utility service. Utilities may invest in non-regulated subsidiaries operating computer companies, baseball teams or cable television systems and under a prudent investment standard, charge ratepayers for their investments on the grounds that it is “prudent” for a utility to diversify its business in a volatile economy. On a more mundane level, a prudent investment test might well guarantee a utility the right to recover from ratepayers the costs of promotional advertising political or charitable contributions, country club dues and the like.

Brief of National Association of Regulatory Utility Commissioners as Amicus Curiae in Duquesne Light Co. v. Barasch, (No. 87-1160) (United States Supreme Court) 1988 WL 1025604 at 18-19. See also Goldsmith, “Utility Rates and Takings,” 10 Energy L.J. 241, 265 (1989). [“Under currently prevailing conditions, with the electric utility industry having just undergone a fundamental transformation from one of low risk to high risk expansion, it would seem almost irrational for regulators to replace the ‘used and useful’ rule with the ‘prudent investment’ rule advocated by the utilities. Proof of imprudence in undertaking the construction of a new power plant is extraordinarily difficult.”]. We agree wholeheartedly.

In February of this year, the Commission correctly pointed to the BLRA as making inapplicable the “used and useful” rule with respect to the construction of nuclear power plants.

The Commission, rejected any argument that the “costs under review in this proceeding ‘are not used and useful in providing utility service’ and so should not be approved by the Commission.” In re Petition of S.C. Elec. & Gas Co., 2017 WL 841308 (February 28, 2017). There, the Commission noted that, by its terms, the BLRA does not provide for the regulation of rates for the construction of nuclear power plants in South Carolina by the longstanding “used and useful” methodology. The Commission explained as follows:

[t]he used and useful standard applies when setting rates to generate a specified return on a utility’s rate base. The used and useful standard distinguishes the “property which it [the utility] necessarily devotes to rendering the regulated services “from nonutility property which is included in rate base and so is not used in determining rates.” Hamm v. S.C. Pub. Serv. Comm., 309 S.C. 282, 286, n. 1, 422 S.E.2d 110, 112, n. 1 (1992) (quoting Southern Bell Tel. and Tel. Co. v. Pub. Serv. Comm. of S.C., 270 S.C. 590, at 600, 244 S.E.2d 278 at 283 (1978).

Proceedings under the Base Load Review Act are not concerned with calculating a return on a rate base. They are concerned with the capital costs of yet to be completed base load units as those costs are reflected in construction work in progress accounts, which the BLRA defines as the utility’s investment in assets that “have not been included in plant in-service,” i.e. property which has not yet closed to rate base. S.C. Code Ann. § 58-33-220(5) and (8). By definition, the capital costs of a plant under construction are not “used and useful . . . in rendering the regulated services.” Hamm, supra. They cannot be “used and useful” until they are completed and put into service. To require costs to be used and useful before being included in a schedule of “anticipated components of capital cost” under S.C. Code Ann. § 58-33-270(E) would make nonsense of the BLRA.

Moreover, the Base Load Review Act specifically addresses the used and useful issue: A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes” so long as it is completed in compliance with the schedule approved by the Commission. S.C. Code Ann. § 58-33-275(A). Thus, plants built according to the BLRA become used and useful when completed according to an approved schedule. But used and useful is not a standard that applies in updating anticipated capital cost schedules under S.C. Code Ann. § 58-33-270(E) while construction is ongoing.

The difference here now is that the constitutionality of application of the BLRA is being challenged.

**Commission Has Ruled Against Excessive Rates In The Past**

Our Supreme Court has held that the regulation of utilities “is a proper exercise of the police power, provided it does not violate constitutional limitations or restrictions.” Bookhart v. Central Electric Coop., 215 S.C. 414, 424-25, 65 S.E.2d 781, 985 (1951). As discussed above, Art. IX, § 1 of the South Carolina Constitution states that the “General Assembly shall provide for appropriate regulation of [utilities] . . . as and to the extent required by the public interest.” This Commission has made clear that Art. IX, § 1 allows only regulation of utilities in the public interest. Re Carolina Water Service, Inc., *supra*. While there are numerous other constitutional flaws in the BLRA discussed below, we believe that the overarching defect in the BLRA is that it does not serve the “public interest.”

In the past, this Commission has denied a proposed rate schedule as “unreasonable and excessive” under the “balancing test” required by Bluefield-Hope. In Re Application of Lost Colony Water System and Recreation Area, Inc., 1980 WL 641338 (April 23, 1980), the Commission denied the proposed rates, noting that, under Bluefield-Hope “[t]his Commission does not insure through regulation that a utility will produce net revenues.” And, in In re Application of Carolina Water Serv., Inc., 1980 WL 641370 (August 28, 1980), the Commission stated: “[t]he Company must insure that its expenses remain at the lowest possible level consistent with reliable service, and that it exercises appropriate managerial efficiency in all phases of its public utility operations.” Historically, the Commission has applied Bluefield-Hope to determine “just and reasonable” rates. Such is what the “public interest” and Art. IX, § 1 demand.

And, in In Re Application of Commodore Utility Corp., 1984 WL 1018903 (January 9, 1984), the Commission stated:

[t]he Commission is of the opinion and so finds that the presently approved schedule of rates and charges remain fair and reasonable and therefore any adjustment thereto is unreasonable and is denied. The Company shall continue under its presently approved rates and charges. Therefore, all proposals of increases in rates and all proposed charges which differ from the Company's presently approved schedule of rates and charges are denied.

The Commission cited Bluefield, Hope and Southern Bell as the basis for its determination.

However, the BLRA, in our view, “drastically diminish[es] protection of the public interest by thrusting the entire risk of a failed investment onto the ratepayers.” Jersey Central, 810 F.2d at 1212 (Mikva, J., dissenting). As Judge Mikva concluded, “[n]either Hope nor the Fifth Amendment takings clause sanctions such radical results.” Id. The rates imposed by application of the Act are “unjust,” “unreasonable,” and not in the “public interest” pursuant to Bluefield-Hope and the Commission’s traditional balancing test.

#### **Case Law Concerning “Public Interest”**

It is well settled that, while the Legislature is the primary judge of what constitutes the “public interest,” a “legislative declaration to the effect that a business . . . demands regulation under the police power or in the public interest is not conclusive, but is subject to judicial review.” Miami Laundry Co. v. Florida Dry Cleaning Board, 183 So. 759, 764 (Fla. 1938). And, as our own Supreme Court has noted, while an Act of the Legislature may be “consistent with the public interest[,] [t]he exercise of such discretion, of course, is subject to proper judicial review.” Suber v. S.C. State Board of Health, 259 S.C. 558, 564, 193 S.E.2d 520, 521 (1972).

The Fourth Circuit has recognized that, with respect to the regulation of utilities, it is the duty of regulators (including the Legislature) “to protect the public interest as distinguished from



the private interest of the utilities. . . .” South Carolina Generating Co. v. Federal Power Commission, 249 F.2d 755, 762 (4<sup>th</sup> Cir. 1957). Such is consistent with the principle that “[a] statute may give a public utility regulatory commission general supervision over all public utilities and has a general responsibility to protect the public interest regarding utility rates. . . . In fulfilling that function, the commission has broadly based authority to do whatever it deems necessary to accomplish it.” 73B C.J.S. Public Utilities § 33. As our own Supreme Court has recognized,

. . . we find no merit in the contention of the plaintiffs that the enforcement of the ordinance will result in financial loss to them, as affecting the validity of the ordinance. In the case of City Council of Charleston v. Wentworth Street Baptist Church, [4 Strob. 306] . . ., it was held that in this State the law will never, by any construction, advance a private interest to the destruction of a public interest; but on the contrary, that it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one. In this same connection, see 16 C.J.S., Constitutional Law, p. 556, § 188.

Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 741 (1943).

Courts have continuously held that, generally speaking, where the exercise of the police power serves a private interest rather than the public interest, it is invalid and unconstitutional. As was noted in App. of Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 384 (1955), the Court struck down an ordinance which absolutely prohibited an electric power company from constructing and maintaining a high tension electric line in the village. There, the Court stated that “[w]here the provision of a zoning ordinance restricting the use by a landowner of his lands do not tend to promote the public interest and general welfare, they may not be justified as being a proper exercise of the police power and they are invalid.”

The Court continued:

[h]ere, the provisions of the ordinance of this Village, operating to stand in the way of necessary public utility development, are contrary to rather

than in the interest of general welfare. The fact that such provisions may be said to promote the health, safety or welfare of a few neighboring property owners is no justification therefore where they are in derogation of general public welfare.

And, in Gates v. Easter, 364 P.2d 438, 441 (Ok. 1960), the Court noted:

[a]lthough private rights must yield to a reasonable exercise of the police power, they are not to be annihilated thereby, or interfered with to any greater extent than is reasonably required by a proper exercise of the power, taking into consideration the legitimate object to be accomplished.... A legislative 'police power' enactment is not conclusive of an asserted public interest or that is detrimental to the general welfare of the State. This is a matter which is always open to judicial inquiry, and a determination of what is a proper exercise of the police power is always subject to supervision of the courts.

Further, in City of Osceola v. Blair, 2 N.W.2d 83, 84 (Iowa 1942) said this of the police power:

[t]he police power of a municipality under said statutes to declare and prevent nuisances, to promote the public welfare, and to provide for the safety and comfort of its inhabitants should be exercised in the interest of the public welfare. The business of soliciting orders from house to house is a lawful occupation and does not adversely affect the public health, safety or welfare. The ordinance in question does not bear any relation to the public interest. That a municipality cannot make a lawful occupation unlawful, cannot deprive a person of his property rights in such business by declaring by ordinance the business to be a nuisance when it is not a nuisance, is too well settled to require a citation of authorities.

Thus, in summary, the BLRA violates Art. IX, § ,1 as applied to SCE&G ratepayers. The Act, by favoring overwhelmingly the private interest – the utility and its stockholders – does not serve the “public interest,” but predominantly private interests. As the United States Supreme Court aptly stated in Smyth v. Ames,

“[i]t cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given percent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling [a utility] . . . , stockholders are not the only

persons whose rights or interests are to be considered. The rights of the public are not to be ignored.”

159 U.S. at 545 (quoting Turnpike Co. v. Sandford, 164 U.S. 578, 596, 597 (1896)) (emphasis added).

Such ignoring of “the rights of the public,” in favor of the rights of the utility and its stockholders, is precisely what the BLRA does. South Carolina has historically employed the value of “used and useful” property in order to ensure that “the return realized from the rates is [not] so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility’s customers.” Mims v. Edgefield County Water and Sewer Authority, *supra* (citing Bluefield and Smyth). A “just and reasonable rate [has, throughout history, been] set by balancing the interests of the ratepayers and the right of the utility to earn a fair return.” S.C. Cable Television Assn. v. Pub. Serv. Comm. of South Carolina, *supra*. Such has been done through the value of “used and useful” property of the utility. Both this Commission and the South Carolina Supreme Court have always applied the Bluefield-Hope analysis, except where the BLRA is involved. Such methodology defines the “public interest” required by Art. IX, § 1.

#### **Arizona Constitution**

As noted above, decisions elsewhere indicate that a provision such as Art. IX, § 1 precludes the Legislature from adopting a rate system other than the one authorized in the Constitution which has always been, as explained above, one based upon the “original cost” of “used and use” property methodology. In Simms v. Round Valley Light and Power Co., 294 P.2d 378 (Ariz. 1956), the Supreme Court of Arizona considered the provision of the Arizona Constitution which required the rate commission to prescribe just and reasonable rates and to assist the commission in doing so, the commission shall “ascertain the fair value of the property within the state of every public service corporation.” The Court explained that while the Arizona

Constitution “does not establish a formula for arriving at fair value, it does require such value to be found and used as the base in fixing rates. The reasonableness and justness of the rates must be related to this finding of fair value.” 294 P.2d at 382.

The Commission argued in Simms “that fair value as used in the Constitution may be considered as synonymous with prudent investment.” However, the Arizona Supreme Court rejected such argument:

[f]air value means the value of properties at the time of inquiry. State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission [262 U.S. 276 (1923)] . . . whereas prudent investment relates to a value at the time of investment. Justice Brandeis’ concurring opinion in State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra. The former allows the increase or decrease in cost of construction to influence the rates, whereas the latter makes no such allowance.

Irrespective of the merits, if any, of the prudent investment theory, because of our Constitution the commission cannot use it as a guide in establishing a rate base.

Id. (emphasis added). The Simms Court then proceeded to give its approval to the “original cost” methodology as used by this Commission historically, and as one consistent with the Arizona Constitution:

[o]ne of the most difficult tasks for a rate-making body is to properly value utility properties to establish a base that when related to the fixed rate of return will be just and reasonable to both the company and the consuming public. The methods used to reach this have been productive of much litigation and debate. In the absence of an admitted charge in material and labor costs since construction, the original costs less depreciation of the physical plant plus working capital necessary to render the service is recognized as a fair guide. McCardle v. Indianapolis Water Co., 1926, 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316; Los Angeles Gas & Electric Corp. v. Railroad Commission, 1933, 289 U.S. 287, 53 S.Ct. 637, 77 L.Ed. 1180. With admitted or proven substantial charge in the cost of materials and labor, the original cost cannot be accepted as the exclusive measure but appropriate consideration must be given this factor of increased costs. State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra; Los Angeles Gas & Electric

Corp. v. Railroad Commission, supra. This is necessary for the reason that the company is entitled to a return upon the fair value of its properties at the time the rate is fixed. State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra; Wilcox v. Consolidated Gas Co., 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382.

Id. at 383. The Arizona Constitution and its application by the Arizona Supreme Court are similar to that of South Carolina. While the Arizona constitutional provision is undoubtedly more explicit, we believe that, based upon South Carolina's longstanding interpretation of the "public interest" – being the "fair value" of "used and useful" property (and the original cost methodology) – the two situations are precisely the same. Accordingly, the Simms analysis is governing here as well.

Our own Supreme Court, in SC Cable TV Assoc., supra, also has rejected a methodology which is not based upon a "fair return" and a "just and reasonable rate set by balancing the interest of the ratepayers and the right of the utility to earn a fair return." 313 S.C. at 51, 437 S.E.2d at 39. There, the PSC adopted an "earnings sharing" plan "in which the PSC would establish a specific rate of return (the 'benchmark') for each LEC"(local telephone company). A rate increase could be sought each time earnings dropped more than 100 points below the "benchmark." Any earnings up to 100 points over the benchmark could be retained by the LEC. Earnings more than 100 points above the benchmark but below the ceiling (benchmark plus 250 points) would be divided equally between the LEC and the ratepayers. Earnings above the ceiling would be returned to the ratepayers.

The Cable TV Association and Consumer Advocate argued that a "rate methodology or return based on anticipated expenses and profits from future technological changes violates South Carolina's traditional requirement that rate-making be based on historical data with allowances for known and quantifiable future changes." 313 S.C. at 51-52, 437 S.E.2d at 40.

Our Supreme Court agreed, stating that the plan would “allow the adoption of a rate of return based largely on speculation rather than historical data.” Id. Thus, it is clear that our Supreme Court is loath to depart from a methodology other than the “fair value” methodology. Once Art. IX, § 1 is considered, any departure from this methodology is unconstitutional.

As the Commission explained in its order in Re: Piedmont Nat. Gas Co., Inc., 1974 WL 391938 (order No. 17, 655) (May 23, 1974), “[t]his Commission has historically used what is commonly known as ‘original cost less depreciation’ in determining plant in service.” (emphasis added). Other than the BLRA, this methodology appears always to have been employed in South Carolina – both before and after Article IX, § 1’s adoption. In such a situation, State ex rel. McLeod v. Snipes, supra concludes that this approach is the proper interpretation of “public interest” in Art. IX, § 1. And, in Duncan v. Record Pub. Co., 145 S.C. 196, 143 S.E. 31, 69 (1927), our Supreme Court stated:

[i]n endeavoring to ascertain the intention of the legislators who submitted the amendment to section 12 of article 5 to the people, and the will of the people who voted favorably to that amendment, and the intention of the General Assembly when the amendment was ratified, we accordingly look back to the situation and condition from the time of the adoption of the Constitution in 1895 to the ratification of the amendment in 1911.

Accordingly, for the reasons set forth herein, the BLRA violates Art. IX, § 1, as applied to SCE&G’s ratepayers. Thus, SCE&G’s Motion to Dismiss should be denied.

### **The BLRA Violates Due Process**

In St. Joseph Stockyards Co. v. U.S., 298 U.S. 38, 51 (1936), the United States Supreme Court stated the following regarding the necessity for due process in rate proceedings:

. . . the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly its action is subject to judicial scrutiny and determination in order to prevent the transgressions of those limits of

power. The Legislature cannot preclude that scrutiny or determination by any declaration of legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts or law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings has kept within that.

Likewise in Permian Basin Rate Cases, supra, the Supreme Court observed that the rate commission “is . . . obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection. . . .” 390 U.S. at 791. And, in Smith and Smith, Inc. v. SC PSC, 271 S.C. 405, 407, 247 S.E.2d 677, 678 (1978), the South Carolina Supreme Court, in affirming the trial court’s reversal of the PSC for the absence of a hearing, quoted with approval language from Ohio Bell Tel. Co. v. Pub. Utilities Comm., 301 U.S. 292 (1937), as follows:

[a]ll the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard’ . . . of a fair and open hearing be maintained in its integrity . . . The right to such a hearing is ‘one of the rudiments of fair play’ assured to every litigant by the Fourteenth Amendment as a minimal requirement. 301 U.S. at 304-305.

The South Carolina Supreme Court thus concluded that a Commission Rule which allowed no hearing was invalid:

Appellants assert this mode of approving transfers under Rule 37 has gone unchallenged for many years. The fact that the Commission relied on Rule 37 in authorizing the transfer of certificates without notice and without a hearing and that this procedure was unchallenged either in court, or by the legislature neither lends legality to the rule nor to the denial of notice and the right to be heard to these respondents.

Porter v. South Carolina Pub. Serv. Comm’n, supra is particularly illustrative of the requirement of due process in rate proceedings. In Porter, “rate increases were ordered without adequate notice to the public.” 338 S.C. at 166, 525 S.E.2d at 867. The notice, which was provided, was “in several newspapers identifying the companies involved and announcing a

public hearing ‘concerning the proposed rate adjustments filed’ by them.” 338 S.C. at 169, 525 S.E.2d at 868. The Supreme Court, however, concluded that such notice was inadequate, in that it “is not informative and in fact is somewhat misleading” and thus, did not afford due process. The Court referenced Art. I, 22 of the State Constitution which provides that “No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” According to the Porter Court, the lack of notice and opportunity to be heard imposed “substantial prejudice” upon ratepayers or consumers. In the opinion of the Supreme Court in Porter, “the public was completely deprived of an opportunity to be heard.” Thus, SCE&G’s arguments that ratepayers lack a “property” interest are beside the point. Ratepayers have an interest pursuant to Art. I, § 22 of the State Constitution to due process.

The Mississippi Supreme Court, in Mississippi Power, supra, also emphasized the importance of due process to ratepayers with respect to a utility’s prudence in construction of a plant. The en banc Mississippi Court emphasized that the taking of ratepayers’ funds or money constituted “property” for purposes of the due process clause (Again, contrary to SCE&G’s arguments). According to the Court, “[t]here is no question that the taking of private funds is a transfer of the property and results in a deprivation of that property.” The Mississippi Court then concluded:

Ab initio, The Commission deprived ratepayers of procedural due process by failing to require notice to the ratepayers. . . . No notice of the original filing was provided to the ratepayers in the overwhelming majority of the Southeastern Mississippi counties constituting MPC’s service area. . . . MPC sought and obtained approval for CWIP recovery that would result in rate increases. When MPC pursued rate increases as part of its certificate filing, all of its customers were entitled to notice. When MPC pursued rate increases as part of its certificate filing, all of its customers were entitled to notice. Few, if any, received it. The ratepayers are “interested parties” in this proceeding. We read these statutes, rules, and



regulations to require that the Commission, on remand, is to order that notice be provided to all ratepayers regarding future proceedings related to rate base, rates, rate of return, and prudency hearings.

Blanton raises his objections, not only for himself, but also for the unnoticed ratepayers. No argument has been advanced that all ratepayers participated in every stage of these proceedings, because it simply is not true. Notice was not properly given. The construction and operation of this multibillion-dollar electric generation facility was going to increase rates. Any suggestion to the contrary is facetious and wholly untenable....

168 So.3d at 914 (emphasis added).

Section 58-33-280, or the so-called “update” process, allows the utility to receive a yearly “approval of revised rates subsequent to those approved in the base load review order.” See § 58-33-280(A). Pursuant to that provision of the BLRA, Subsection (C) allows “[w]ritten comments to the commission and the Office of Regulatory Staff concerning the revised rates and the information supporting them . . . within one month of the revised rates filing.” Following review, ORS “shall serve on the commission and all intervenors and parties of record a report indicating the results of its review and audit and proposing any changes to the revised rates or the information supporting them that the Office of Regulatory Staff determines to be necessary to comply with the terms of this article.” Subsection (D). Following the ORS Report, Subsection (E) allows further written comments. Then, “[t]he Office of Regulatory Staff may revise its report considering comments filed.” No later than four months after the date of the revised rates filing, pursuant to Subsection (F), “the commission shall issue a revised rates order granting, modifying, or denying revised rates as filed by the utility.” Subsection (H) provides that “[i]f the utility is granted a rate increase in the revised rates order,” the utility must “provide notice to its customers, with the next billing.” The utility may implement revised rates for bills rendered on or after a date selected by the utility, which may not be sooner than thirty days after revised rates are approved.

Of course, the granting of rate increases, pursuant to § 58-33-280's "update" procedure, is required to be more or less routine. See Energy Users Committee v. SCE&G, 410 S.C. at 356-57, 764 S.E.2d at 917 ["The General Assembly anticipated that construction costs would increase during the life of the project."]. Art. I, § 22 of the South Carolina Constitution, however, forbids an administrative agency, such as the Commission, from the issuance of a "quasi judicial decision . . . affecting private rights except on due notice and an opportunity to be heard." Section 58-33-280 violates Art. I, § 22, as well as the federal and state due process clauses. Thus, SCE&G ratepayers have been repeatedly deprived of due process by application of § 58-33-280. Such has cost ratepayers well in excess of a billion dollars in rate increases. This Commission has steadfastly ensured due process historically and the BLRA's absence of due process here requires the Commission's redress.

In Barasch v. Pa. Pub. Util., 546 A.2d 1296 (Pa. 1988), the Pennsylvania Commonwealth Court rejected the argument that customers received sufficient due process by virtue of publication and an opportunity to make comments. There, the Court distinguished the case of Pa. Coal Mining Assn. v. Insurance Dept., 370 A.2d 685 (Pa. 1977). The Barasch Court noted that

[i]n Pennsylvania Coal the Court held that notice and an opportunity to present written objections before proposed insurance rates were deemed into effect by virtue of the Insurance Commissioner's inaction were adequate due process protections when coupled with the opportunity to challenge the rates later in a full hearing before the Insurance Commissioner pursuant to Section 814. In other words, the Court did not view the deeming of rates into effect as a final, affirmative approval of those rates by the Insurance Department, nor subject to later challenge. By contrast, in the present case, final affirmative approval is precisely what West Penn sought and received, from the PUC. If the Commission's order is affirmed by the courts, then the propriety of the contract's capacity cost credit rate will not be subject to later challenge in a complaint proceeding before the commission under Section 701; that issue will have been fully adjudicated already in these proceedings. Therefore,

the present circumstances are not analogous to those in Pennsylvania Coal.... Unless notice and an opportunity to be heard on the issue of the propriety of the contract rates are provided before final PUC approval of the terms of a contract between a utility and a QF, they will not be provided at all.

546 A.2d at 1306 (emphasis in original). Thus, the Court in Barasch concluded,

[W]e disagree with West Penn's contention in its appeal that the due process rights of its customers would be protected adequately by a procedure involving publication of the Commission's decision in the Pennsylvania bulletin followed by a thirty-day period in which interested persons might submit written comments on the decision. First, such a procedure would needlessly postpone the customers' opportunity to challenge the proposed action until after the Commission has formulated a decision on the matter and had a stake in preserving that decision. Unlike the circumstances involving current utility fuel expenses present in Allegheny Ludlum the utility here is not now incurring expenses that it must recover immediately in order to preserve its financial health. Here no obligations arise until the PUC approves the contract. Second, such a procedure would allow only written submissions without any later opportunity for a full hearing, as in Pennsylvania Coal.

Id. (emphasis added). Like our Supreme Court's decision in Porter, discussed above, publication, together with some form of "comment" period or, in the case of Porter, a "public hearing," announced in the newspaper, is completely inadequate for the purposes of due process. See also Popowsky v. Pa. Pub. Util. Comm'n, 805 A.2d 637 (Pa. 2002) [allowance by the Public Utility Commission of opportunity to submit comments without opportunity to present evidence or cross-examine witnesses in dispute over water utility's proposed rate increase did not give opponents meaningful opportunity to be heard as required by due process]; Porter, supra. Thus, § 58-33-280 of the BLRA violates due process as applied to SCE&G ratepayers. As Justice Hearn recognized in Energy Users, the BLRA has "no mechanism in place to challenge the prudence of SCE&G's financial decisions." 388 S.C. at 496, 697 S.E.2d at 592. The BLRA impermissibly allows yearly rate increases without sufficient due process. Porter, supra. Again, we ask the Commission to redress this abuse of the constitutional rights of ratepayers.

In addition, Sections 58-33-275(A), and (B), and (C) are constitutionally flawed as well.

These provisions state:

Section 58-33-275(A). A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and the property included in rates so long as the plant is constructed or is being constructed within the parameters of:

- (1) The approved construction schedule including contingencies;  
and
- (2) The approved capital cost estimates including specified contingencies.

(B) Determinations under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding, including proceeds under Section 58-27-810 and other applicable provisions and Section 58-33-280 and other applicable provisions of this article.

(C) So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), the utility must be allowed to recover its capital costs related to the plant through rate filings or general rate proceedings.

The legal problem with § 58-33-275 is that this provision precludes as a matter of law any further challenge to prudence (or used and useful) by anyone in any court or forum at any time. See Energy Users Committee, 388 S.C. at 496, 697 S.E.2d at 592; Energy Users Committee, 410 S.C. at 358-60; 764 S.E.2d at 918-19. Under well recognized principles of law, such a complete and sweeping bar – even as to non-parties – to the original prudence action, violates due process.

In State v. Dykes, 403 S.C. 409, 744 S.E.2d 505 (2013), our Supreme Court held that a defendant who was precluded from challenge for his lifetime an order for satellite monitoring following the initial order imposing monitoring violated due process. According to the Court, “[t]he complete absence of any opportunity for judicial review to assess a risk of re-offending,

which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's purpose of protecting those with a high risk of re-offending." 403 S.C. at 508, 744 S.E.2d at 510. Thus, the Court held that "it is unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review. . . ." *Id.*, at 508-09.

Moreover, the total bar upon subsequent litigation related to prudence and the designation by law of the "used and useful" status of a plant from the outset, imposed by § 58-33-275, also violates due process. While certain public interest groups, such as Friends of the Earth and South Carolina Energy Users Committee, were involved in the initial litigation leading up to the Base Load Review Order, many other ratepayers were not involved in that proceeding. Yet, § 58-33-275's sweep, prohibiting any future challenge, encompasses everyone, at any time and in any forum ["Determinations Under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding. . . ."] This complete foreclosure as to any litigant or any challenge violates due process.

It is well recognized that "to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented' would violate due process." *Northeast Ohio Coalition For The Homeless v. Husted*, 837 F.3d 612, 623 (6<sup>th</sup> Cir. 2016) (quoting *Richards v. Jefferson County*, U.S. 793, 794 (1996) (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). In *Richards*, the United States Supreme Court held that prior litigation to challenge the constitutionality of a county's occupation tax did not bind different taxpayers and did not bar them from attacking the constitutionality of the deprivation of their property. Moreover, the Court held that the county was not entitled to rely upon the assumption that prior litigation conclusively established the constitutionality of the tax.

Richards noted the following longstanding rules as generally applicable:

[t]he limit on a state court's power to develop estoppel rules reflect the general consensus "in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated as a party or to which he has not been made a party by service of process." Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940). This rule is part of our deep-rooted historic that everyone should have his own day in court. . . . ' As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the right of strangers to those proceedings."

[cases omitted].

517 U.S. at 798.

The Richards Court also rejected the conclusion of the Alabama Supreme Court that "taxpayers in the Bedingfield action adequately represented the interests of the taxpayers here...." The Court noted that Petitioners' action was one of "presenting a federal constitutional challenge to a state's attempt to levy personal funds. . . ." Such an action took on a unique status because "we have previously struck down as a violation of due process a state court's decision denying an individual taxpayer any practical opportunity to contest a tax on federal constitutional grounds." Id. at 803. Thus, the Court concluded:

[i]n any event, the Alabama Supreme Court did not hold here that petitioners' suit was of a kind that, under state law, could be brought only on behalf of the public at large. . . . To conclude that the suit may nevertheless be barred by the prior action in Bedingfield would thus be to deprive petitioners of their "chose in action," which we have held to be a protected property interest in its own right. . . . Thus, we are not persuaded that the nature of petitioners' action permits us to deviate from the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution.

Id. at 804 (emphasis added).

Section 58-33-275(A)(B) and (C) represent just such "an extreme application of state-law res judicata principles. . . ." Subsection (B) forecloses any challenge to prudence of "used and useful" in "any subsequent proceeding. . . ." Here, the Attorney General is challenging the

constitutionality of the various provisions of the BLRA relating to these matters. As noted in the opinion of September 26, 2017, the ‘used and useful’ definition, as employed in the BLRA, is arbitrary, because it represents a complete departure from the term’s meaning the common “used and useful” definition. The “prudence” assumptions used in § 58-33-280 are, as set forth above, unconstitutional, as applied to ratepayers, because of lack of due process. See In Re Application of BellSouth Telecomm., Inc., 2005 WL 7149822 (March 24, 2005) [“Applying the settlement to all parties without a hearing violates the due process rights of the non-agreeing parties.”].

The Attorney General, as the chief law officer of the State who possesses the duty to protect the public interest and the wellbeing of a utility’s ratepayers may assert the due process rights of ratepayers here. The Office of Attorney General has taken such a position historically. See Southern Bell. Tel. & Tel. Co. v. Pub. Service Comm’n, 270 S.C. at 592, 244 S.E.2d at 279 [Attorney General intervened in opposition to the proposed rate increases for telecommunications services]; See also State ex rel. McLeod v. Yonce, *supra* (Attorney General challenges statute governing appointment of circuit judge by Chief Justice to preside over rate cases); S.C. Elec & Gas Co. v. Pub. Serv. Comm’n, 275 S.C. 487, 272 S.E.2d 793 (1980) (Attorney General respondent in appeal by power company of refund order of Public Service Commission). Thus, pursuant to the foregoing authorities, the Attorney General asserts that § 58-33-275 is unconstitutional, as applied to SCE&G ratepayers on whose behalf the Attorney General has intervened.

### **The BLRA Violates Equal Protection**

Our Supreme Court stated in Bodman v. State, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) the following:

[t]he South Carolina Constitution provides that no “person shall be denied the equal protection of the laws.” S.C. Const. art. § 3. The “sine qua non

of an equal protection claim is a showing that similarly situated person received disparate treatment.” Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); see also Sloan v. Bd. Of Physical Therapy Exam’rs, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006) (“A crucial step in the examination of any equal protection issue is the identification of the pertinent class. . . .”). Not all classifications are unconstitutional, however, “[t]he equal protection clause only forbids irrational and unjustified classifications.” [In re Treatment and Care of Luckabaugh, 351 S.C. 122] at 147, 568 S.E.2d [338] of 351 (quotation omitted). So long as the statute “does not implicate a suspect class or abridge a fundamental right, the rational basis test is used “to determine whether the classification falls in the prohibited group. Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and a classification rests on a rational basis. Id.

As the Bodman decision emphasized, the Court affords “great deference to the General Assembly’s decision to create a classification.” Id. As a result, “those who challenge the validity of one under rational basis review must ‘negate every conceivable basis which might support it.’” 403 S.C. at 69, 742 S.E.2d at 367. A classification must be “plainly arbitrary” in order not to be sustained.

However, the BLRA is patently discriminatory with respect to the sources of base load power which are included and excluded under the Act. Of all the possible “base load” sources of power, only nuclear power receives the full benefits of the Act. Coal is treated far less favorably under the Act than nuclear power. Section 58-33-220(17) states expressly that

[f]or a coal plant, no revised rates shall be allowed except that an adjustment under Section 58-33-280(J)(1) shall be permitted to take effect on or after the date commercial operations of the plant commence.

(emphasis added). Moreover, as one authority has written “Coal, nuclear and hydro-electric plants are standard base load units, though natural gas-fired plants could also provide base load generation.” Gundlach, “What’s The Cost of A New Nuclear Plant? The Answer’s Gonna Cost



You: A Risk-Based Approach to Estimating The Cost of New Nuclear Plants,” 18 N.Y.U. L.J. 600, 611 (2011) [referencing U.S. Dept. of Energy Report, “Cost and Performance Baseline for Fossil Energy Plants, § 5.3 at 484 (2007)]. See also, Nawaguna, “Coal’s Real Enemy Natural Gas, Congressional Quarterly, June 20, 2016 [“Now that natural gas has gotten so cheap, that gas is now used for base load as well as for peak,” (quoting James Williams, an analyst for the newsletter Energy Economist)]. Indeed, SCE&G has just announced the acquisition of a 550 megawatt natural-gas generation plant in Calhoun County which exceeds the statutory minimum capacity for baseload power.

Our Supreme Court has held that a statute which is, like the BLRA, arbitrarily underinclusive violates equal protection. In Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978), the Court struck down a statute (§ 15-3-640) which granted to architects, engineers and contractors in the real estate industry immunity after ten years. Citing Gasque v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939), the Court noted that Equal Protection “requires that all members of a class be treated alike under similar circumstances and conditions and that any classification cannot be arbitrary. . . .” 270 S.C. at 230, 241 S.E. at 740. The Court’s analysis in concluding that the statute was unconstitutional is highly instructive here, as related to the BLRA:

[t]he question then is whether there is a sound basis for regarding architects, engineers and contractors engaged in the improvement of real property as a distinct and separate class for the purpose of granting immunity from suit after the lapse of ten (10) years. Certainly, such classification must fall if the benefits (immunity) granted to them is denied to others similarly situated. The latter result clearly follows when we consider that architects, engineers and contractors are not the only person whose negligence in the improvement of real property may cause damage or injury to others. Neither the owners nor the manufacturers of components that go into the construction of the building are protected. In fact, the owner is specifically excluded from the statute. . . . Only architects, engineers and contractors are singled out for preferential treatment. While it is broadly stated that vital distinctions exist between architects, engineers and contractors on the one hand, and owners and

manufacturers on the other, such vital distinction is nowhere pointed out such as to justify granting immunity to one group and not to the other. No rational basis appears for making such distinction.

The BLRA is remarkably similar to the situation in Truluck. Even though other sources of power are capable of supporting base load generation of power, neither hydroelectric plants, natural gas plants, nor alternative fuel plants receive the benefits of the BLRA, while coal plants are denied the § 58-33-280 annual rate increases which nuclear plants receive. The result is that customers of a utility which is building a nuclear plant pursuant to the BLRA are subjected to rate increases annually (“updates”) pursuant to § 58-33-280, as well as modification increases pursuant to § 58-33-270(E) while non-BLRA utility customers are not. Such disparate treatment of the BLRA denies Equal Protection.

Also instructive with respect to the BLRA’s violation of Equal Protection is Doe v. State, supra. In Doe, our Supreme Court invalidated the gender-limited definition of “household member” contained in the Domestic Violence Reform Act and the Protection From Criminal Domestic Violence Act. Those statutes, which “provide remedies for victims of domestic violence who meet the statutory definition of ‘household member[s],’” excluded unmarried, cohabiting or formerly cohabiting same-sex couples from those protections. All five Justices agreed that the statutes were underinclusive and violated equal protection.

The majority in Doe concluded that the proper remedy was that the statutes were unconstitutional as applied to Doe “or those in similar same-sex relationships. . . .” The Court noted that, on its face, the statute was capable of a valid application, but that, as applied to same-sex, cohabiting couples, it was invalid. In the Court’s view, absent an “as applied” analysis, “the ‘household member’ definitional sections must be struck down.” Thus, the Court chose instead to apply the definition to same-sex couples, as well as opposite sex couples.

Moreover, the BLRA discriminates against present ratepayers of a utility operating under the BLRA and in favor of that utility's future ratepayers. Courts have recognized that where a rate is determined without the "used and useful" principle being employed, such assesses "present ratepayers for [a] plant that would service future ratepayers. . . ." Ky. Utilities Co. v. FERC, 1321, 1324, n. 4 (D.C. Cir. 1985). There, the Court further observed that "given the length of time necessary to construct a plant, the class of future ratepayers would obviously not be identical to the class of current ratepayers." Id. As another court has stated, it is a "fundamental rate-making principle that current ratepayers should not be compelled to pay for the facilities which will be used and useful only in the future." Colorado Ute Electrical Assn. v. Pub. Utilities Comm. of State of Colorado, 602 P.2d 861, 866 (Colo. 1979). Moreover, the Court, in Tenn. Gas Pipeline Co. v. FERC, 606 F.2d 1094, 1109 (D.C. Cir. 1979) aptly summarized the rule as follows:

. . . in Smyth v. Ames, . . . the Supreme Court articulated the guiding principle that "the basis of all calculations as to the reasonableness of rates to be charged by a (public utility) must be the fair value of the property being used by it for the convenience of the public." Although methods for determining value of rate base have evolved since Smyth v. Ames, the prescript endures that an item may be included in the rate base only when it is "used and useful" in providing service. In other words, current ratepayers should bear only legitimate costs of providing service to them. The FPC early adopted the "used and useful" standard and has not departed from it without careful consideration of the wisdom of requiring current ratepayers to bear costs of providing future service.

Thus, not only is the BLRA discriminatory as to ratepayers of a utility which employs the BLRA (only nuclear power plants), in doing so, the Act also discriminates against that utility's present ratepayers in favor of future customers. Such "double discrimination" violates Equal Protection.

**The BLRA Constitutes A “Taking” of Ratepayers’ Property  
In Violation of the Federal and State Constitutions**

As was discussed in our September 26, 2017 Opinion, the BLRA also violates the “Takings” Clause under both the Federal Constitution (Amendment V), as well as Art. I, § 13 of the State Constitution. This “Takings” claim under the federal and state Constitutions is, of course, separate and independent from the Art. IX, § 1 argument, although the two certainly overlap. Contrary to SCE&G’s argument, we do not rely solely upon the concurring opinion of Judge Starr in Jersey Central, *supra*, for purposes of violation of the 5<sup>th</sup> Amendment of the federal Constitution. The United States Supreme Court established the federal Constitution criteria in Permian Basin Rate Cases, *supra*. There, it is stated:

[i]t is, however, plain that the ‘power to regulate is not a power to destroy.’ Stone v. Farmers’ Loan & Trust Co., 116 U.S. 307, 331, 6 S.Ct. 334, 345, 29 L.Ed. 636; Covington & Lexington Turnpike Road Co. v. Sanford, *supra*, 164 U.S. at 593, 17 S.Ct. at 204, and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations. Price control is ‘unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . .’ Nebbia v. People of State of New York, 291 U.S. 502, 539, 54 S.Ct. 505, 517, 78 L.Ed. 940. Nonetheless, the just and reasonable standard of the Natural Gas Act ‘coincides’ with the applicable constitutional standards, FPC v. Natural Gas Pipeline Co., *supra*, 315 U.S. at 586, 62 S.Ct. at 743, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory. Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or a geographical area can never be confiscatory, we hold only that any such rates determined in conformity with the Natural Gas Act and intended to ‘balanc(e) . . . the investor and the consumer interests,’ are constitutionally permissible. FPC v. Hope Natural Gas Co., *supra*, 320 U.S. at 603, 64 S.Ct. at 288.

390 U.S. at 769-70.

As our September 26, 2017 opinion pointed out, Judge Starr, in his concurring opinion in Jersey Central, discussed the Hope-Permian Basin test at length. See Jersey Central Power and Light, 810 F.2d at 1190-91 (discussing the Hope “balancing” test). Judge Starr’s emphasis was on the fact that the “prudence” and “used and useful” principles serve to safeguard consumers, to ensure that “the balance between investor and ratepayer interests is [not] struck unjustly.” If such a balance is not maintained, “a taking [of ratepayers’ property] occurs.” Id. None of the separate opinions in Jersey Central disagrees with that analysis. As pointed out above, Judge Bork, speaking for the majority in Jersey Central, stated that “Hope Natural Gas makes clear that exploitative rates are illegal. . . .” 810 F.2d at 1180. Historically, this Commission and the South Carolina Supreme Court have applied the same constitutional standard. See Mims, supra. Under this view of the Constitution, the BLRA destroys the “balance” between the interests of the utility’s investors and that of ratepayers to such an extent that a “taking” of SCE&G ratepayers’ property has occurred.

Our September 26 Opinion analyzed the principles of Hope Natural Gas and how we believe the BLRA effectuates an unconstitutional “taking” of SCE&G ratepayers’ property under the Fifth Amendment of the federal Constitution. In that Opinion, we advised as follows:

3. Under the federal and state Constitutions, it has long been held that a utility rate must be “just and reasonable”; thus, there must be the proper “balance” between the interests of investors and ratepayers. Our Supreme Court, recognized in the Mims case that, in setting utility rates, “[t]he focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility’s customers.” Long ago, Justice Harlan, in the Smyth case noted that “[t]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.” Likewise, the Hope Natural Gas case mandates that the fixing of “just and reasonable” rates requires “balancing the investor and the consumer interests.” As Judge Bork stated in the Jersey Central Power case, “the holding of Hope Natural Gas makes clear that exploitative rates [upon the consumer] are illegal. . . .” “Under Hope

Natural Gas, rates are just and reasonable only if consumer interests are protected and if the financial health of the [company] in our economic system remains strong.” Fed. Power Comm. v. Memphis, Light, Gas and Water Div., 411 U.S. 458, 474 (1973).

4. Given the constitutional standard that rates must reflect a proper balance between the interests of investors and consumers, in our opinion, the BLRA is throughout weighted far too heavily in favor of the utility’s interest and against the interest of ratepayers. We acknowledge that the purpose of the Act was to encourage investment in new nuclear facilities. That is a proper public purpose. However, in its zeal to accomplish that purpose, the Legislature went too far. See Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922) [“if regulation goes too far, it will be recognized as a taking.”]. Rather than balancing the interests of investors and ratepayers, the Act is substantially skewed against customers of the utility. The Act makes ratepayers virtually the insurers of the interests of the utility’s investors. The BLRA departs from longstanding law by shifting the burden from the utility to establish prudence. In the proceeding to modify the “schedules, estimates, findings, class allocation factors, rate designs, or conditions” of the initial base load review order pursuant to § 58-33-270(E), the PSC is required to grant such “modifications” unless the utility is shown to be imprudent and the modifications are determined to be unjust or unreasonable. Thus, such modifications were granted in virtually every instance in which SCE&G has sought them..

Further, ratepayers are foreclosed or impeded by several provisions of the Act from challenging the prudence of the utility. Most strikingly, the ratepayer cannot further contest the prudence of the initiation of the project following the initial base load review order. As SCE&G wrote in its Brief in Friends of the Earth, “[t]his statutory finality provides certainty for investors.” Brief at 6. However, as the United States Supreme Court stated in Permian Basin, a rate procedure “is obliged at each step of the regulatory process to assess the requirements of the broad public interests entrusted to its protections. . . .” 390 U.S. at 791 (emphasis added). And, as our Supreme Court held in Porter v. S.C. PSC, ratepayers are entitled to due process, consisting of notice and an opportunity to be heard under Art. I, § 22 of the State Constitution. 338 S.C. at 170, 552 S.E.2d at 869. See also State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) [statute precluding for life any challenging to electronic monitoring violates due process]. These various procedural bars in the BLRA may well violate due process.

Moreover, upon “abandonment” of the project, the utility may still recoup, through rate increases, its capital costs, construction costs, and a substantial return on investment for utility investors. § 58-33-280(K). Yet, consumers receive nothing in return but an unfinished plant.

Accordingly, this abandonment provision is particularly onerous to ratepayers because it requires them to pay in full for a plant not nearly finished and providing no service to customers. Such a provision eviscerates the longstanding rule in South Carolina that a plant must be “used and useful” to recover capital costs. Based upon existing case law, the abandonment provision skews the balance between investors and ratepayers heavily in favor of the utility. Moreover, the abandonment provision may well authorize a “taking” of property for private use in violation of the Fifth Amendment of the Federal Constitution (as incorporated by the 14th Amendment) and Art. I, § 13 of the State Constitution. The abandonment provision mandates the transfer of property from ratepayers to the utility for a private use with no customer service in return.

5. Numerous cases illustrate this constitutional “takings” principle. Judge Ken Starr’s opinion in Jersey Power and Light is particularly instructive with respect to the federal “Takings Clause.” He opined that “a taking occurs . . . when the balance between investor and ratepayer interests – the very function of utility regulation – is struck unjustly.” 810 F.2d at 1191. Judge Starr noted that a rate must not only “avoid confiscation of the utility’s property,” it must not constitute “a taking of the property of ratepayers through unjustifiably exorbitant rates.” *Id.* He recognized that, even though Hope Natural Gas does not require a particular methodology, and the principle of “used and useful” cannot always be employed, the “used and useful” principle remains an important safeguard for consumers in striking a reasonable balance between ratepayers and investors under Hope. He reasoned that the “prudence” and “used and useful” principles “assure that the ratepayers, whose property might otherwise of course be ‘taken’ by regulatory authorities, will not necessarily be saddled with the results of managements’ defalcations or mistakes, or as a matter of simple justice, be required to pay for that which provides the ratepayers with no discernible benefit.” 810 F.2d at 1190 (emphasis added). Thus, in his mind, the “used and useful” concept is essential to avoid a “taking” of ratepayers’ property through the payment of rates.

Indeed, in Jersey Power and Light, the Court of Appeals for the D.C. Circuit remanded to FERC for a determination as to whether inclusion in the rate base (of a cancelled nuclear plant) of the unamortized portion of the plant would, pursuant to Hope, “exploit consumers in this case” or [whether] “exclusion” would constitute confiscation of the utility’s property.” And, importantly, long after Hope was decided, our own Supreme Court has continued to deem the utility’s rate base to be properly founded upon “used and useful” property (citing the definition used in Smyth v. Ames in the Mims case).

Accordingly, when both the “prudence” and “used and useful” principles are conclusively pre-determined by the General Assembly, without a basis in fact or an opportunity for meaningful challenge, as the BLRA does, the balance between investors and ratepayers becomes heavily and unfairly skewed against consumers. The Act resorts to a “fiction” that incomplete or abandoned nuclear plants are, nevertheless, “used and useful” upon issuance of the initial base load review order even though, of course, they are not. Ground may not even have been broken, but the plant is deemed “used and useful” by the BLRA. Cases indicate that such a conclusive determination, not based upon actual fact, is unconstitutional. In the meantime, customers pay heavily for plants never completed and service never provided.

Justices Littlejohn and Lewis in the Piedmont Power case, [277 S.C. 345, 383 S.E.2d 476, 486 (1982)] likened the imposition of rates – with the prospect of nothing in return – [to] an imposed, unconstitutional “tax” for the benefit of a private utility. He reasoned that because ratepayers are paying, but getting nothing in return, such a situation violates the State Constitution. While he did not employ a “takings” analysis, the result is the same. A serious “takings” issue, therefore, arises under Hope Natural Gas.

This conclusion is buttressed by the Supreme Court’s decision in Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998), concluding that the Coal Act violates the “Takings Clause” by imposing retroactive liability upon an employer because such liability “places a severe, disproportionate, and extremely retroactive burden on Eastern.”. See also 524 U.S. at 549 (Kennedy, J. concurring in judgment) [“The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process.”]; Pa. Elec. Co., supra [“... The Hope decision is to be interpreted as recognizing a constitutional requirement of ‘just and reasonable’ rates, providing a return on used and useful property with rates to be determined through a balancing of consumer interests.”]; Kan. Gas and Electric Co. v. Kan. Corp. Comm., supra [Hope requires a balancing of interests based upon “used and useful” property]; Dayton Power & Light Co. v. Public Utilities Comm. of Ohio, supra [“It would be inequitable to prematurely shift the risk of plant failure from the utility’s investors to the ratepayers by the inclusion in the rate base of highly complex and innovative technology which has not been proven to be reasonably free from significant design or construction defects.”]; NEPCO Mun. Rate Comm. v. FERC, supra [“used and useful” rule means that “current ratepayers should bear only legitimate costs of providing service to them.”]; Mims, supra [citing Smyth v. Ames, supra to the effect that ratepayers are to be protected from “exorbitant rates.”].



6. The fundamental tenet of utility regulation is based upon fair and equitable rates in exchange for services provided. As one court has stated, “[t]he Commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation.” Myers v. Blair Tel. Co., 230 N.W.2d 190, 196 (Neb. 1975) (emphasis added).

It is also important to note that the “Takings Clause” protects all property without distinction as to types. Horne v. Dept. of Agriculture, 135 S.Ct. 2419 (2015). Further, the “Takings Clause” forbids a taking for a private use, even if just compensation is paid. Montgomery v. Carter County, Tenn., 226 F.3d 758, 766 (2000). Moreover, under the “Takings Clause,” “one person’s property may not be taken for the benefit of another private person, without a justifying public purpose even though compensation be paid.” Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984); see also Kelo v. City of New London, 545 U.S. 469, 477 (2005) [“it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”]. Here, pursuant to the BLRA, the utility charges customers for an unfinished plant and investors are fully compensated by receiving a substantial return on their investment. One court has likened this type of situation to a car manufacturer cancelling a new sports car factory before completion, yet being able still to charge sports car purchasers for the unfinished plant even though there is no plant to make the cars and no cars to ride in. Citizens Action Coalition, *supra*.

Accordingly, the BLRA, which shifts the burden to ratepayers to subsidize a utility’s investors upon abandonment, lacks the “public use” necessary to survive a “Takings” challenge. Instead, it is a private use of another’s property – the consumers’ – which, is forbidden by the “Takings Clause” of the federal Constitution. See e.g. Mo. Pacific R.R. Co. v. Nebraska, 164 U.S. 403, 416-17 (1896) [statute requiring railroad to transfer right of way to farmers for erection of grain elevator is a transfer from one private person to another for a private purpose, in violation of the Takings Clause]. See also Smalley v. Duke Energy, 154 So.3d 439 (Fla. 2014) [Court concludes statute allowing utility to recover costs for cancelled plant is not facially unconstitutional, but court suggests that where circumstances preclude utility from completing plant due to circumstances beyond its control, the public purpose is defeated and only a private purpose is involved]. As Citizen Action Coalition, *supra* states, “[a]llowance of amortization of cancelled plants [“that never became used and useful”] would encourage uneconomical or unproductive ventures. . . .” 485 N.E.2d at 616. Further, as Justices Littlejohn and Lewis stated in Piedmont Mun. Power, *supra*, this is an example of the law ‘charging the

customers for power never received,” -- a private purpose. The federal Takings Clause prohibits such transfers.

7. Case law, recognizes that ratepayers property interests are at serious risk of a “taking” when capital investments in property which is not “used and useful” are included in the rate base, such as is the case with an abandoned or cancelled nuclear plant. These decisions have thus upheld legislation which excludes such plants from the rate base, concluding that inclusion is unfair to consumers and such exclusion does not constitute a “taking” of the utility’s property. As the Texas Court stated in El Paso Elec. Co. v. Pub. Util. Comm. of Texas, 917 S.W.2d 846, 882 (Tex. 1995), “[c]onstitutional protections [for utilities] . . . do not entitle [these] utilities to immediate return on investments that are imprudent or not used and useful in providing service to customers.” And, as the Pennsylvania Supreme Court explained in Barasch v. Pa. Public Utility, 532 A.2d 325, 336, aff’d, Duquesne Light Co. v. Barasch, supra, “. . . just as a utility has no constitutional right to have included in its rate base assets which are not ‘used and useful’ in the public service, so too may it be restricted as to what items it can properly claim as operating expenses.” Moreover, Duquesne, itself is said to have “revived Smyth’s substantive ratemaking methodology. Duquesne recognized that regulatory determinations of utility rates might benefit from a ‘return to some form of the fair value rule.’” Chen, “The Death of the Regulatory Compact,” 67 Ohio St. C.J. 1265, 1287 (2006) (quoting Duquesne, 488 U.S. at 316, n. 10). As Justice Harlan wrote in Smyth long ago, “. . . the rights of the public would be ignored if rates . . . are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses pay the interest on its obligations, and declare a dividend to stockholders.” 169 U.S. at 544.

Moreover, we also concluded in our September 26, 2017 Opinion that Art. I, § 13 of the State Constitution is even more protective of property rights than the Fifth Amendment of the federal Constitution. SCE&G is wrong when it argues that the federal Constitution somehow “preempts” Art. I, § 13. It is well recognized that a state constitutional provision “may impose higher standards and stronger protections than those set by the federal Constitution . . . even where the State and federal Constitutions contain similar or identical provisions.” State v. Randolph, 74 S.W.3d 330, 334-35 (Tenn. 2002) (quoting Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979). As noted above, State v. Thrift, supra held that the State Constitution’s protection

against self-incrimination is more protective than the federal Constitution in terms of “use” immunity. Thus, as we explained in our Opinion,

8. Further, the requirements of our State Constitution, with respect to its “Takings Clause” (Art. I, § 13), are even more stringent with respect to the necessity for a “taking” only for a “public use” than is required by the Federal Constitution. As our Supreme Court has emphasized in Ga. Dept. of Transp. v. Jasper Co., 355 S.C. 631, 638, 586 S.E.2d 853, 856 (2000), under our State Constitution, “[t]he involuntary taking of an individual’s property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property.” “‘Public use’ implies possession, occupation, and enjoyment of the land by the public at large or by public agencies. . . .” Cases such as Edens v. City of Columbia, supra and Karesh v. City Council of Chas., supra and Georgia Dept. of Transp. v. Jasper Co., supra, demonstrate clearly that government cannot take property, and then allow it to be devoted to a private use (such as payment to the investors of a utility).

We believe this is a correct statement of the law. Thus, in our view, the BLRA has “taken” the property of SCE&G customers, with nothing to show for it but much higher utility bills.

### **CONCLUSION**

The BLRA has deprived SCE&G ratepayers of their constitutional rights from start to finish. Dealing only with the single setting of construction of nuclear power plants, the legislation radically revamps South Carolina’s longstanding ratemaking methodology, turning it from one designed to impose just and reasonable rates, protecting utility and ratepayer interests alike, into one which subsidizes SCE&G and its investors. We ask the Commission to redress the application of this unconstitutional legislation and to remedy SCE&G ratepayers consistent with the ORS Petition. It may do so here because of the unconstitutional application of the BLRA. Thus, the SCE&G Motion to Dismiss should be denied.

As the United States Supreme Court recognized in Duquesne, the “fair value” system of determining rates, the one which South Carolina has long employed (except for the BLRA),

“gives utilities strong incentive to manage their affairs well and to provide efficient service to the public.” 488 U.S. at 309. The Commission has, since its creation in 1910, sought to appropriately balance the interests of utility investors and ratepayers by using this methodology, and by determining the utility’s rate base only for “used and useful” property. August Kohn and Co. v. PSC, 281 S.C. 28, 30, 313 S.E.2d 630, 631 (1984) [“Normally, the unit for rate-making purposes would be the entire interconnected property used and useful for the convenience of the public in the territory served....”]. It has long imposed just and reasonable rates by application of “Bluefield-Hope,” which our Southern Bell decision requires. Southern Bell, a case decided almost immediately after Art. IX, § 1’s adoption, thus essentially defined “public interest” for purposes of that provision of the Constitution. In other words, rates must be based upon the “fair value” of “used and useful” property as Southern Bell commands and South Carolina always has determined such rates on a “just and reasonable” basis. The Commission has remained steadfast in an effort to meet Art. IX, § 1’s requirements, historically employing the “original cost less depreciation method on “used and useful” property. This methodology has historically constituted the regulation of public utilities “in the public interest,” as intended by the framers of Art. IX, § 1. Such a methodology is time-tested and historically proven.

However, the BLRA – in this one instance only, involving the construction of nuclear generating facilities – turns this longstanding and reliable system of determining just and reasonable rates on its head. By requiring that ratepayers subsidize and support SCE&G investors and allowing the utility to collect its financing costs “up front,” long before the plant is built, and by assessing yearly rate increases upon customers to pay those costs, the BLRA promotes the private interests of SCE&G and its investors. This Commission rejected such an approach in its order in Madera, supra. This so-called “prudent investment” system strips

ratepayers of due process, equal protection and “takes” their property with nothing to show for it, but rising utility bills. Such a system is not “in the public interest,” as required by Art. IX, § 1 of the South Carolina Constitution, but is in the private interest. As Judge Starr aptly stated in Jersey Central, such a system requires ratepayers “to pay for that which provides [them] with no discernible benefit.” And, as Judge Bork noted in that same case “the holding of Hope Natural Gas makes clear that exploitative rates are illegal. . . .” The rates imposed by the BLRA are likewise unconstitutional. Case law elsewhere has, in similar circumstances, found such a system to be violative of that State’s Constitution. The same is the case here.

In short, the BLRA seeks to provide SCE&G a shelter from the forces of the free market. However, ratepayers are not a safety net for SCE&G’s investors. As the National Association of Regulatory Commissioners has written, the “used and useful” test “serves important regulatory purposes,” but “[a]doption of the prudent investment test as the ‘constitutional benchmark’ for utility ratemaking would effectively foreclose the ability of regulators to allocate the risks of plant failures between shareholders and ratepayers.” The BLRA removes this Commission’s ability to do precisely that. Instead, the BLRA creates a system which exploits ratepayers. Surely, that is not a system “in the public interest” as Art. IX, § 1 of the State Constitution requires.

As the United States Supreme Court stated long ago, “[t]he public cannot properly be subject to unreasonable rates in order simply that the stockholders may earn dividend.” Smyth v. Ames, 169 U.S. 466, 545 (1898), quoting Covington & L. Turnpike Road Co. v. Sanford, 164 U.S. 578, 596 (1896). Those words are just as true today with respect to the BLRA, as they were when the Supreme Court wrote them over a century ago. The BLRA has required the imposition of unreasonable rates for the benefit of SCE&G’s stockholders.

We respectfully urge the Commission to redress this untenable situation by denying SCE&G's Motion to Dismiss and granting ORS's Request.

Respectfully submitted,

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BY: 

ATTORNEYS FOR THE  
STATE OF SOUTH CAROLINA EX REL.  
ALAN WILSON, ATTORNEY GENERAL

Date: November 21, 2017

## **ATTACHMENT A**

<b>SCE&amp;G - Rate 8</b> <b>Historical Residential Bills</b>		
<u>Effective Date</u>	<u>Avg. Bill for 1,000 kWh</u>	<u>Reason for Change in Rate</u>
5/1/2017	\$147.53	Fuel, Distributed Energy Resource (DER) Program, Demand Side Management/Energy Efficiency (DSM/EE) Rider, Pension Rider <sup>1</sup>
11/27/2016	\$147.53	Base Load Review Act (BLRA)
5/1/2016	\$143.67	Fuel, DER Program, DSM/EE Rider, Pension Rider
10/30/2015	\$149.58	BLRA
5/1/2015	\$145.87	Fuel and DSM/EE Rider
10/30/2014	\$146.40	BLRA
5/1/2014	\$142.29	Fuel, DSM/EE Rider, and Pension Rider <sup>1</sup>
10/30/2013	\$142.29	BLRA
5/1/2013	\$138.11	Fuel and DSM/EE Rider
1/1/2013	\$137.65	Rate Case, Fuel, DSM/EE Rider, Pension Rider
10/30/2012	\$135.06	BLRA
8/1/2012	\$131.78	Tax Credit Decrement Rider expiration
5/1/2012	\$130.64	Fuel and DSM/EE Rider
10/30/2011	\$129.97	BLRA
8/1/2011	\$126.74	eWNA Credit Decrement Rider expiration
6/1/2011	\$124.70	DSM/EE Rider
5/1/2011	\$124.52	Fuel
10/30/2010	\$124.03	BLRA
9/1/2010	\$121.16	DSM/EE Rider
7/16/2010	\$120.90	Rate Case <sup>2</sup> , Tax Credit Decrement Rider, eWNA Credit Decrement Rider
5/1/2010	\$118.14	Fuel
10/30/2009	\$118.79	BLRA
5/1/2009	\$117.48	Fuel
3/1/2009	\$114.68	BLRA
11/1/2008	\$114.20	Mid Period Fuel
5/1/2008	\$107.67	Fuel
1/1/2008	\$106.54	Rate Case
5/1/2007	\$101.10	Fuel
5/1/2006	\$99.95	Fuel
5/1/2005	\$97.34	Fuel

<sup>1</sup>No change in average monthly bill due to zero net effect of these rate changes

<sup>2</sup>eWNA monthly bill adjustment commenced. This adjustment is not reflected in bill amounts.



**Duke Energy Carolinas - Rate RS**  
**Historical Residential Bills**

<u>Effective Date</u>	<u>Avg. Bill for 1,000 kWh</u>	<u>Reason for Change in Rate</u>
10/1/2017	\$112.62	Fuel and Distributed Energy Resource Program (DERP)
1/1/2017	\$111.34	Demand Side Management/Energy Efficiency (DSM/EE) Rider
10/1/2016	\$110.84	Fuel and DERP
1/1/2016	\$116.57	DSM/EE Rider
10/1/2015	\$115.99	Fuel and DERP
1/1/2015	\$117.05	DSM/EE Rider
11/1/2014	\$116.89	Merger Capacity Mitigation Rider expiration
10/1/2014	\$116.73	Fuel
9/18/2014	\$113.52	Rate Case
1/1/2014	\$110.46	DSM/EE Rider
10/1/2013	\$108.79	Merger Fuel Savings Rider expiration, Fuel
9/18/2013	\$106.97	Rate Case
1/1/2013	\$100.45	DSM/EE Rider
12/1/2012	\$100.98	Rate Case
10/01/2012	\$99.51	Fuel
09/01/2012	\$105.96	Merger Savings for Fuel and Capacity Mitigation
02/15/2012	\$106.77	DSM/EE Rider restored
02/08/2012	\$103.73	Rate Case
02/01/2012	\$97.73	Pension Rider and Nuclear Insurance Reserve Decrement Rider expiration
01/01/2012	\$97.03	DSM/EE Rider suspended
10/01/2011	\$99.72	Fuel
04/01/2011	\$94.87	Pension Rider reduction
01/01/2011	\$94.95	DSM/EE Rider
10/01/2010	\$93.99	Fuel, Coal Inventory Rider expiration
02/01/2010	\$92.70	Rate Case, DSM/EE Rider, Pension Rider, Coal Inventory Rider, Nuclear Insurance Reserve Decrement Rider
10/01/2009	\$80.32	Fuel
10/01/2008	\$83.22	Fuel
10/01/2007	\$78.88	Fuel
06/01/2007	\$78.42	Cinergy Merger Decrement Rider expiration
10/01/2006	\$76.64	Fuel, Tax Decrement Rider expiration
06/01/2006	\$72.93	Cinergy Merger Decrement Rider
10/01/2005	\$74.71	Fuel, Tax Decrement Rider

## Duke Energy Progress - Rate RES

### *Historical Residential Bills*

<b><u>Effective Date</u></b>	<b><u>Avg. Bill for 1,000 kWh</u></b>	<b><u>Reason for Change in Rate</u></b>
1/1/2017	\$113.17	Rate Case, Demand Side Management/Energy Efficiency (DSM/EE) Rider
7/1/2016	\$101.98	Fuel, Distributed Energy Resource Program (DERP)
1/1/2016	\$104.77	DERP, DSM/EE Rider
7/1/2015	\$101.20	Fuel
11/1/2014	\$105.14	Merger Capacity Mitigation Rider expiration
7/1/2014	\$105.02	Fuel, DSM/EE Rider
7/1/2013	\$104.88	Fuel, DSM/EE Rider, Merger Fuel Savings Rider expiration
9/1/2012	\$100.77	Merger Savings for Fuel and Capacity Mitigation
7/1/2012	\$101.57	Fuel, DSM/EE Rider
7/1/2011	\$103.85	Fuel, DSM/EE Rider
7/1/2010	\$99.15	Fuel, DSM/EE Rider
7/1/2009	\$100.90	Fuel, DSM/EE Rider
7/1/2008	\$102.19	Fuel
7/1/2007	\$96.33	Fuel
7/1/2006	\$94.50	Fuel
7/1/2005	\$91.49	Fuel

## **ATTACHMENT B**

## NewsRoom

2/18/07 Columbia State (SC) d1  
2007 WLNR 3215730

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Section: d

New S.C. reactors planned

JASON RYAN, jpryan@thestate.com

There's a new nuclear age dawning in South Carolina -- and the state's utility companies are asking residents to help foot the bill.

Billions of dollars are planned to be spent in the next four years in plans, permits and construction of as many as five new reactors in the Carolinas.

Under a law proposed last week in the State House, the cost of financing the \$2.5 billion to \$5 billion plants -- approximately 10 to 20 percent of the total cost -- could be **more easily passed on to ratepayers**.

New coal plants are included in the bill.

Customers soon could start paying financing costs each year on loans taken out for engineering, permits and construction of the plants.

The average power customer's bill initially could go up about 10 percent over the next five years to pay for the interest on those construction loans.

When the plants are up and running, in 2016 or later, customers' rates then could go up again, to pay for the construction and design.

Duke Power, Progress Energy and SCANA say building the plants -- and paying finance costs now -- would ensure cheap and reliable energy for the future.

By paying millions in dollars in financing costs now, they argue, customers could avoid having to pay off higher interest that would accumulate until the plants become operational in 2016 or later.

But consumer advocates, as well as some manufacturers, bristle at forcing today's customers to pay for power of the future.

The majority of Midlands electricity customers are served by SCE&G, a SCANA subsidiary, which is considering building one or two reactors at the V.C. Summer plant in Jenkinsville it operates with state-owned utility Santee Cooper.

SCANA predicts that quicker payment of financing costs will create a long-term, 40-year savings of \$800 million -- shaving 1 to 2 percent off customers' bills.

In the short term, SCANA power bills could increase about 1.5 percent a year, or 12 percent from 2009 to 2016, said Kenny Jackson, director of rates and regulation for the power company. For the average household with a bill of about \$1,250, that is about a \$20-a-year increase.

Customers must remember they are already benefiting from existing power plants paid for by previous generations, Jackson said.

SCANA also said the bill would firm up support and financing for new plants, which makes the company more attractive to investors and, in turn, makes power more affordable.

New federal subsidies, as well as high natural gas and coal costs, are encouraging power companies to consider building nuclear plants as they plan for growth.

A new nuclear power plant has not been ordered in the United States since 1978, according to the Nuclear Regulatory Commission.

As many as five new reactors are planned to provide electricity to South Carolina residents.

South Carolina utilities estimate the following short-term pre-construction cost estimates for permitting and planning proposed reactors at existing plants:

**\*\* \$125 million this year for two reactors at William Statesly III Nuclear Station owned by Duke Power and Southern Co. in Cherokee County;**

**\*\* \$75 million between 2005 and 2008 for SCE&G's 55 percent stake for up to two reactors at the V.C. Summer power plant in Jenkinsville, and;**

**\*\* \$390 million in the next four years for Santee Cooper's 45 percent stake in V.C. Summer.**

Progress Energy is also considering a new reactor at its Harris nuclear plant outside New Hill, N.C., but no cost estimates are available for the next few years, a spokesman said.

While investor-owned utility companies can recoup financing costs associated with such spending under the current law, the new bill proposes "streamlining" the process, said Dukes Scott, executive director of the state's utility watchdog, the Office of Regulatory Staff.

Under the new bill, the S.C. Public Service Commission would rule up front whether a utility's plans, timeline and cost schedule for a nuclear plant are prudent, Scott said.

As long as utilities stick to that plan and encounter little public and regulatory opposition, the power company can apply annually to include financing costs in rates.

Previously, utilities had to win approval for the costs when they applied for general rate increases before the commission and the prudence of the plant could again come under question.

Santee Cooper, a state-owned utility, does not report to the commission. Its board members, appointed by the governor, have approved including financing costs in rates since the mid-1990s, spokeswoman Laura Varn said.

The chief sponsor of the bill, Rep. Harry Cato, R-Greenville, said the bill will save South Carolina residents money and increase the state's power reserve.

"It's a way to entice the utilities to build the generation we need and at the same time it builds in some consumer protection," said Cato, influential chairman of the House Labor, Commerce and Industry Committee.

Having more plants in South Carolina is important in case of energy shortages, Cato said. "I don't want to be a California where we have rolling blackouts and brownouts."

Cato's home in Travelers Rest is surrounded by major manufacturers that include Milliken, Michelin and BMW -- all of which declined to comment for this article. A spokesman for Gov. Mark Sanford also declined to comment on the bill.

Cato expects them and others to have opinions when the House holds hearings on the bill this month -- especially manufacturers that pay especially hefty power bills each year and are struggling with thin profit margins.

"There are a lot of major manufacturers in the Upstate who are concerned about this," Cato said. "They're maybe concerned about paying for future generation they won't be around to enjoy."

Tax credits could be granted to appease major manufacturers, Cato said, but the state needs to encourage the construction of nuclear plants.

"The savings will be fairly significant," he said. "I think it's worth doing it."

Reach Ryan at (803) 771-8595.

## POWER HUNGRY

South Carolinians are using more power today than ever before.

\*\* The average household today has many more appliances that use electricity than was the case even a generation or two ago.

\*\* In 2003, the average kitchen refrigerator used 1,462 kilowatts of electricity -- more than double the electricity used by an entire household in 1932.

\*\* Color TVs, computers, DVD players and video game systems were either not common or did not exist in 1970, when consumers paid among the lowest prices ever for electricity.

## GROWING DEMAND

Average SCE&G household electricity usage through the years

1932

Kilowatts used: 617

Average monthly bill: \$3.28

Adjusted for inflation: \$37.94

1950

Kilowatts used: 2,446

Average monthly bill: \$5.29

Adjusted for inflation: \$39.03

1970

Kilowatts used: 9,853

Average monthly bill: \$15.64

Adjusted for inflation: \$75

2003

Kilowatts used: 14,538

Average monthly bill: \$104.58

SOURCE: S.C. Office of Regulatory Staff, U.S. Department of Energy

-- Ben Werner

--- Index References ---

Company: SOUTHERN CO (THE); SHENG KE HUAN BAO JI TUAN YOU XIAN GONG SI; SCE; US DEPARTMENT OF ENERGY; PROGRESS ENERGY RESOURCES CORP; NUCLEAR REGULATORY COMMISSION; SCANA CORP; DUKE ENERGY CORP

Industry: (Electric Utilities (1EL82); Utilities (1UT12); Construction Financing (1CO12); Utilities Regulatory (1UT69); Construction Regulatory (1CO33); Nuclear Electric Power (1NU69); Construction (1CO11))

Region: (North America (1NO39); Americas (1AM92); South Carolina (1SO63); USA (1US73))

Language: EN

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New S.C. reactors planned, 2007 WLNR 3215730

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Statesly) (South Carolina) (United States) (South Carolina) (South Carolina) (Harris) (South Carolina) (South Carolina) (California) (us; usa; na; us.sc; us.sc.columb; gb; gbr; uk; eu; nam; gb.eng; us.ca; gb.eng.harris)

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**NewsRoom**



## ATTACHMENT C

## NewsRoom

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October 3, 2014

Contractors say it will cost \$1 billion more to finish new nuclear reactors at V.C. Summer

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The contractors building two new reactors at SCE&G's V.C. Summer nuclear plant in Fairfield County said Thursday it would cost an additional \$1.2 billion to finish the work there.

However, SCE&G indicated they have not agreed to the consortium's new cost estimates nor any projected new completion dates.

Cayce-based SCANA Corp. , the parent company of the electric utility, released a statement Thursday afternoon saying its construction and design consortium, primarily Chicago Bridge & Iron Co. and Westinghouse, informed them the increased preliminary cost estimates are needed to support project delays announced in August associated with engineering problems, fabrication and procurement of components and construction issues.

SCE&G, which owns 55 percent of the new two-reactor project, would be charged an additional \$660 million to reach completion of the project, and Santee Cooper , which owns the remaining 45 percent, would be charged an additional \$540 million to cover completion costs, SCANA said.

The CB&I and Westinghouse consortium told SCANA in August they were undertaking a full re-baselining of the V.C. Summer plant's Unit 2 and Unit 3 new reactors due to projected delays that would move completion of the Unit 2 reactor back to late 2018 or early 2019 and Unit 3's completion back a year beyond that to at least late 2019.

The \$1.2 billion revised cost estimate issued by the engineering and construction consortium Thursday is in 2007 dollars, SCANA's announcement said, "and would be subject to escalation."

"It also excludes any owner's cost amounts associated with the delays, which amounts could be significant," the SCANA statement read. "The consortium's preliminary schedule and the cost estimate information are under review by SCE&G and Santee Cooper , and it is anticipated that further study, evaluation and negotiations will occur," SCANA said.

The two new reactors at Summer initially were supposed to cost \$9.8 billion, which SCE&G has been allowed to begin collecting from ratepayers prior to power generation under the state Base Load Review Act. Charging customers up front is projected to cut finance costs of the project, ultimately costing ratepayers less.

If the increased costs are to be added to the total cost of the reactor, SCE&G and the consortium will have to negotiate whose responsibility those increased costs fall to – SCE&G and its ratepayers or the consortium, which has had multiple delays with fabrication and delivery.

The same concept applies for reaching an agreement on when the reactors are to be completed. Whatever the new considerations are will have to be approved by the S.C. Public Service Commission .

"At this point, we cannot predict when the revised schedule and cost estimate will be finalized," said Eric Boomhower, SCE&G public affairs manager.

"Once a revised schedule and cost estimate are complete, if the schedule and/or the capital costs were to exceed what is currently approved by the Public Service Commission of South Carolina , **we would expect to petition the PSC for an order to update the construction milestone and capital cost schedules,**" he said.

"The Base Load Review Act provides that the commission would grant the petition as long as it is determined that the change is not the result of imprudence on our part. At that point, we would assess the potential impact on future rate adjustments under the BLRA.," Boomhower said.

Last week, SCE&G residential customers were hit with an average \$49 a year increase on their electric bills starting this month – the seventh rate increase passed along to customers since construction of the new reactors began in 2008.

The Public Service Commission approved this latest 2.92 percent residential rate hike to help cover \$66.2 million in construction costs for the two new reactors at the Summer Nuclear Station in Jenkinsville, about 25 miles northwest of Columbia.

The average monthly residential bill will rise \$4.11 to \$146.40 as a result of this latest rate hike, SCE&G said, and those new rates take effect Oct. 30.

#### ---- Index References ----

Company: CHICAGO BRIDGE AND IRON COMPANY NV; WABTEC CORP

Industry: (Commercial Construction (1CO15); Construction (1CO11); Electric Utilities (1EL82); Electric Utilities Generation (1EL37); Electric Utilities Generators (1EL15); Energy & Fuel (1EN13); Energy Plant Construction (1EN34); Nuclear Electric Power (1NU69); Utilities (1UT12))

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